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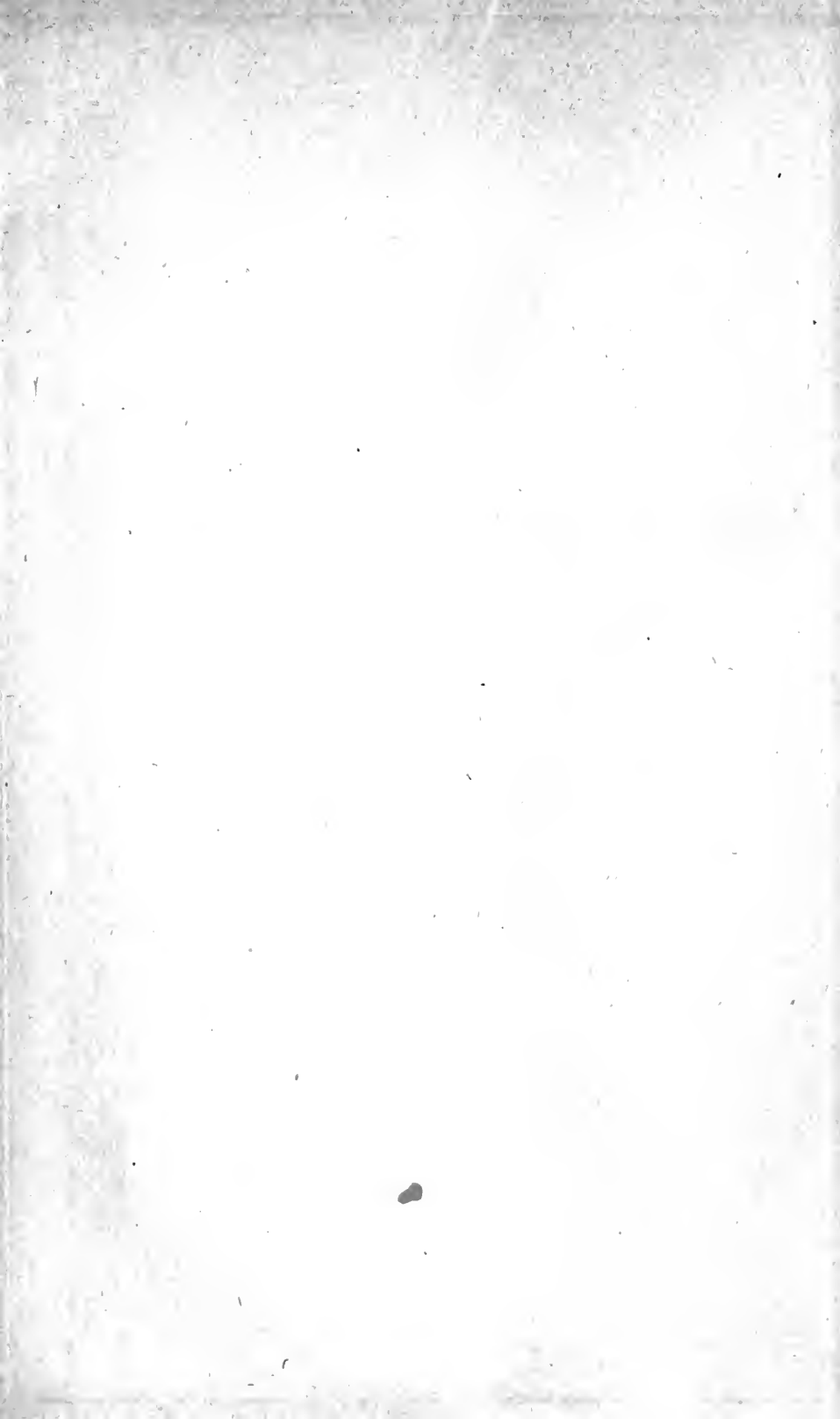
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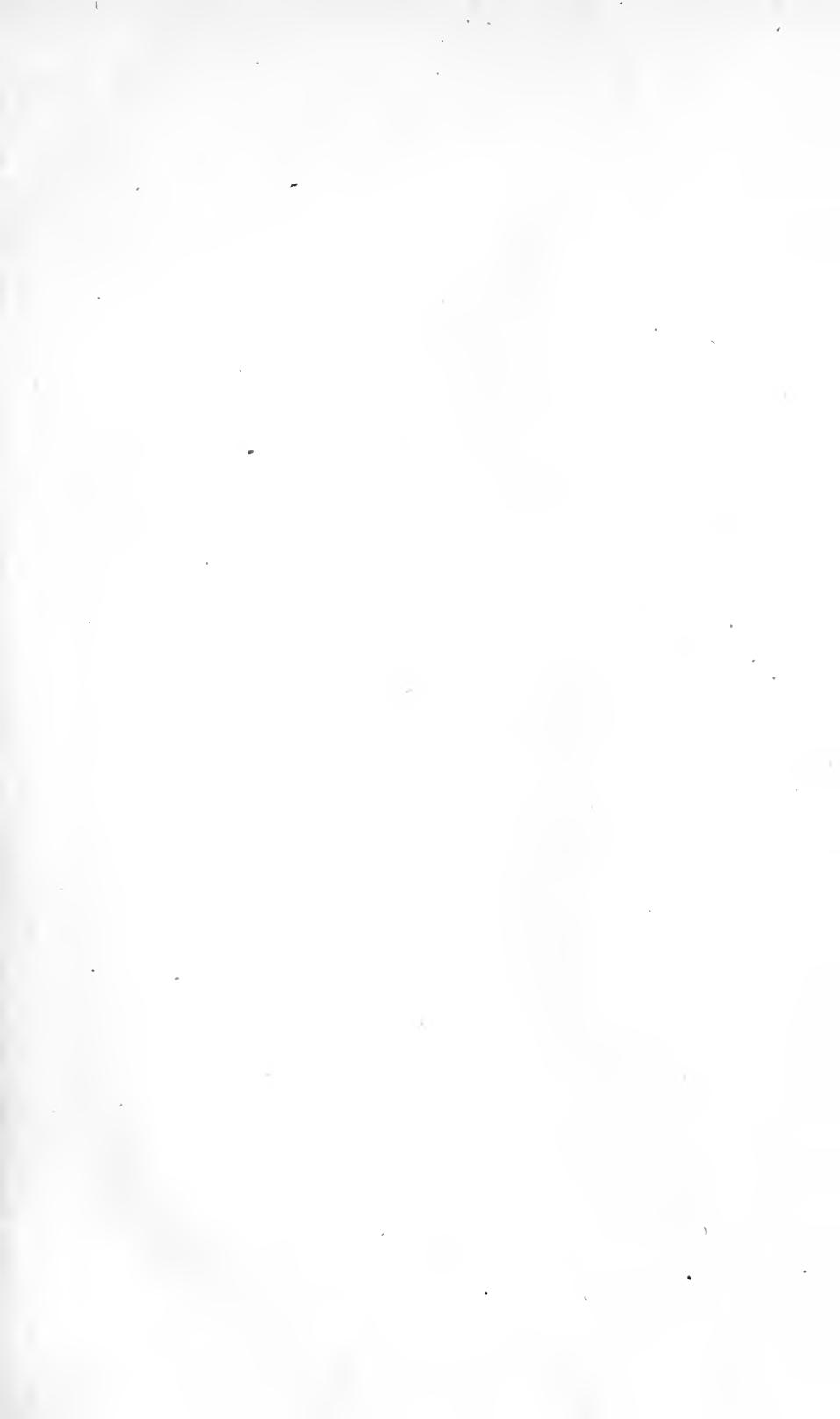


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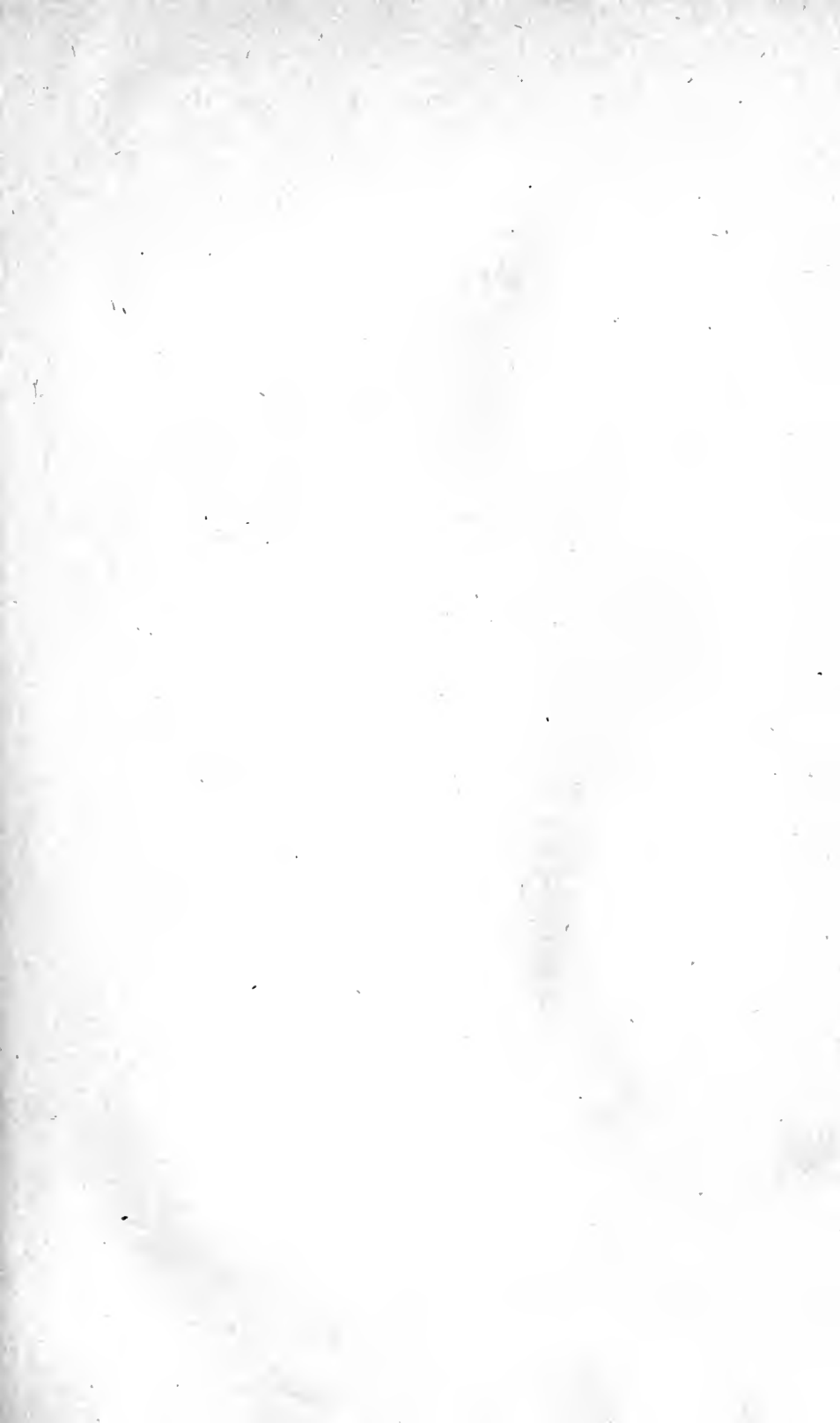
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HORNBOOK CASE SERIES

ILLUSTRATIVE CASES
ON
TORTS

By H. GERALD CHAPIN, LL. M.

PROFESSOR OF LAW IN FORDHAM UNIVERSITY
AND IN NEW JERSEY LAW SCHOOL

A COMPANION BOOK TO CHAPIN ON TORTS

ST. PAUL
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To
*Fordham University School of Law, and to
my fellow members of the Faculty, this short
collection of cases is respectfully dedicated by*

The Author.

(iii)*

THE HORNBOOK CASE SERIES

It is the purpose of the publishers to supply a set of Illustrative Casebooks to accompany the various volumes of the Hornbook Series, to be used in connection with the Hornbooks for instruction in the classroom. The object of these Casebooks is to illustrate the principles of law as set forth and discussed in the volumes of the Hornbook Series. The text-book sets forth in a clear and concise manner the principles of the subject; the Casebook shows how these principles have been applied by the courts, and embodied in the case law. With instruction and study along these lines, the student should secure a fundamental knowledge and grasp of the subject. The cases on a particular subject are sufficiently numerous and varied to cover the main underlying principles and essentials. Unlike casebooks prepared for the "Case Method" of instruction, no attempt has been made to supply a comprehensive knowledge of the subject from the cases alone. It should be remembered that the basis of the instruction is the text-book, and that the purpose of these Casebooks is to illustrate the practical application of the principles of the law.

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HORNBOOK CASES ON TORTS

PART I

GENERAL PRINCIPLES

THE TORT CONCEPT

I. The Nature of a Tort ¹

II. Difference between Tort and Contract ²

RICH v. NEW YORK CENT. & H. R. R. CO.

(Court of Appeals of New York, 1882. 87 N. Y. 382.)

The complaint alleged in substance that, about 1850, plaintiff, with others who were the owners of certain lands in the village of Yonkers, entered into an agreement with the Hudson River Railroad to convey to said corporation a site for its depot; that the agreement was carried out, the site conveyed and the depot erected; that defendant succeeded to the rights, franchises and obligations of said Hudson River Railroad Company and plaintiff acquired the titles of the other owners of said remaining lands; that there was a navigable inlet crossed by said railroad and known as the Nepperhan or Sawmill river; that the Hudson River Railroad Company, having no right to cut off or obstruct the navigation in said inlet, had constructed and maintained a drawbridge over it; that it subsequently procured the passage of an act of the legislature, authorizing it to bridge said inlet without any opening or draw, on making compensation to the riparian owners; that defendant to avoid the payment of damages to said owners, "resolved to accomplish the same object by artifice and strategy," and so threatened said riparian owners that unless they would surrender their rights and consent to the construction of such bridge it would remove its depot, and upon said owners refusing so to do, did remove its depot to a point above a third of a mile north; that plaintiff, a short time previous to

¹ For discussion of principles, see Chapin on Torts, §§ 1-16.

² For discussion of principles, see Chapin on Torts, §§ 7, 8.

the threatened removal, had borrowed on his bond secured by mortgage on his said lands the sum of \$35,000 most of which was expended in erecting stores on his said lands directly opposite and about one hundred feet south of said depot and if the depot had not been removed could have rented said stores and the adjacent lots for \$5,000 per annum and could have sold other lots for sufficient to pay off said mortgage, but in consequence of such removal his premises became wholly unproductive and unsalable; that in order to have the depot restored to its original site, and to save his property from being sacrificed, he was induced and coerced into giving his consent to the closing of said drawbridge and an agreement was entered into on March 7, 1877, in and by which defendant in consideration of such consent agreed that it would "as soon as practicable, and within a reasonable time, build and forever thereafter maintain its principal passenger depot for Yonkers" upon said original site; that defendant thereupon removed the drawbridge and erected a permanent bridge over the inlet; that it also erected a new depot on the old site and had the same ready for use about April 15, 1878, but absolutely refused to open or establish its depot there unless the common council of Yonkers would pass an ordinance declaring and ordering the closing of a portion of a street which crossed tracks so that it could build a fence inclosing said tracks which would so exclude the plaintiff and others from the right and privilege of crossing said tracks to the steamboat docks on the Hudson River; that the closing of said street would have damaged plaintiff's property to at least the sum of \$50,000 and would have neutralized, in great measure, all the benefits derived from the restoration of the depot; that the common council refused to pass an ordinance to that effect, because of the large amount of damages the city would have to pay; that upon such refusal being made known defendant's officers publicly asserted that it would never open said new depot until said ordinance was passed, and would tear down the new depot or use it exclusively for freight ("in all of which the defendant was actuated by malice and vindictiveness towards plaintiff and a design to crush, ruin and destroy him"); that in consequence of the removal of the depot and the consequent unproductiveness of plaintiff's property, he was unable to pay the interest on said bond and mortgage; that foreclosure was commenced and a decree of foreclosure and sale was made; but that the mortgagee had foreborne selling; that defendant's officers and agents called upon the mortgagee and induced it "to withdraw the grace and favor" accorded to plaintiff, and to advertise the property immediately for sale, so as to cut off plaintiff's claim for damages, the mortgagee having been induced to waive any such claim; that plaintiff's entire property was sold under said decree and bid off by the mortgagee for \$20,000 and thereupon the ordinance was passed closing said street and defendant immediately opened the new depot. * * *

Upon the trial plaintiff offered in evidence the agreement of 1877, which was objected to and excluded as irrelevant and incompetent.

Plaintiff also offered to show the alleged breach of that contract, the value of the property conveyed to defendant and the establishment of the depot originally thereon; that the defendant caused and procured the sale of plaintiff's property under the foreclosure decree to deprive him of his claim for damages for closing the street; that it was sold for less than one-fifth of its value; that plaintiff was dispossessed at the instigation of defendant and that if the depot had been re-established the market value of the property would have been largely increased. * * *

Defendant moved for a dismissal of the complaint and the motion was granted. * * *

FINCH, J.³ We have been unable to find any accurate and perfect definition of a "tort." Between actions plainly *ex contractu* and those as clearly *ex delicto* there exists what has been termed a "borderland," where the lines of distinction are shadowy and obscure, and the tort and the contract so approach each other, and become so nearly coincident, as to make their practical separation somewhat difficult. Moak's *Underhill on Torts*, 23. The text-writers either avoid a definition entirely (*Addison on Torts*), or frame one plainly imperfect (2 *Bouvier's Law Dict.* 600), or depend upon one which they concede to be inaccurate, but hold sufficient for judicial purposes (*Cooley on Torts*, 3, note 1; *Moak's Underhill*, 4; 1 *Hilliard on Torts*, 1). By these last authors a tort is described in general as "a wrong independent of contract." And yet, it is conceded that a tort may grow out of, or make part of, or be coincident with, a contract (2 *Bouvier*, *supra*), and that precisely the same state of facts between the same parties may admit of an action either *ex contractu* or *ex delicto* (*Cooley on Torts*, 90). In such cases the tort is dependent upon, while at the same time independent of, the contract; for, if the latter imposes the legal duty upon a person, the neglect of that duty may constitute a tort founded upon a contract. 1 *Addison on Torts*, 13. Ordinarily, the essence of a tort consists in the violation of some duty due to an individual, which duty is a thing different from the mere contract obligation. When such duty grows out of relations of trust and confidence, as that of the agent to his principal or the lawyer to his client, the ground of the duty is apparent, and the tort is, in general, easily separable from the mere breach of contract. But where no such relation flows from the constituted contract, and still a breach of its obligation is made the essential and principal means, in combination with other and perhaps innocent acts and conditions, of inflicting another and different injury, and accomplishing another and different purpose, the question whether such invasion of a right is actionable as a breach of contract only, or also as a tort, leads to a somewhat difficult search for a distinguishing test.

³ Portions of the statement of facts and of the opinion are omitted.

In the present case, the learned counsel for the respondent seems to free himself from the difficulty by practically denying the existence of any relation between the parties except that constituted by the contract itself, and then insisting that such relation was not of a character to originate any separate and distinct legal duty, argues that therefore the bare violation of the contract obligation created merely a breach of contract, and not a tort. He says that the several instruments put in evidence showed that there never had been any relation between the plaintiff and the railroad company, except that of parties contracting in reference to certain specific subjects, by plain and distinct agreements, for any breach of which the parties, respectively, would have a remedy, but none of which created any such rights as to lay the foundation for a charge of wilful misconduct or any other tortious act. Upon this theory, the case was tried. Every offer to prove the contracts, and especially their breach, was resisted upon the ground that the complaint, through all its long history of plaintiff's grievances, alleged but a single cause of action, and that for a tort, and therefore something else, above and beyond and outside of a mere breach of contract, must be shown, and proof of such breach was immaterial. * * *

The exclusion of proof of the contract for re-establishing the depot, and the willful and intended breach of that contract, brings up for our consideration the question principally argued. Such exclusion must rest for its justification upon the theory of the defendant's counsel, already adverted to, and which we are troubled to reconcile with his concession that a cause of action was alleged in the complaint. At the foundation of every tort must lie some violation of a legal duty, and therefore some unlawful act or omission. Cooley on Torts, 60. Whatever or however numerous or formidable may be the allegations of conspiracy, of malice, of oppression, of vindictive purpose, they are of no avail; they merely heap up epithets, unless the purpose intended or the means by which it was to be accomplished are shown to be unlawful. *O'Callaghan v. Cronan*, 121 Mass. 114; *Mahan v. Brown*, 13 Wend. 261, 28 Am. Dec. 461. The one separate and distinct unlawful act or omission alleged in this complaint, or rather the only one so separable which we can see may have been unlawful, was the unreasonable delay in restoring the depot to its original location; and that was unlawful, not inherently or in itself, but solely by force of the contract with plaintiff. The instigation of the sale on foreclosure, as a separate fact, may have been unkind, or even malicious, but cannot be said to have been unlawful. The mortgagee had a perfect right to sell, judicially established, and what it might lawfully do it was not unlawful to ask it to do. The act of instigating the sale may be material, and have force, as one link in a chain of events, and as serving to explain and characterize an unlawful purpose, pursued by unlawful means; but, in and of itself, it was not an unlawful act, and cannot serve as the foundation of a tort. *Randall v. Hazelton*, 12 Allen

(Mass.) 412. We are forced back, therefore, to the contract for re-establishing the depot, and its breach, as the basis or foundation of the tort pleaded. If that will not serve the purpose in some manner, by some connection with other acts and conditions, then there was no cause of action for a tort stated in the complaint. We are thus obliged to study the doctrine advanced by the respondent, and measure its range and extent. It rests upon the idea that, unless the contract creates a relation, out of which relation springs a duty, independent of the mere contract obligation, though there may be a breach of the contract, there is no tort, since there is no duty to be violated. And the illustration given is the common case of a contract of affreightment, where, beyond the contract obligation to transport and deliver safely, there is a duty, born of the relation established, to do the same thing. In such a case, and in the kindred cases of principal and agent, of lawyer and client, of consignor and factor, the contract establishes a legal relation of trust and confidence; so that, upon a breach of the contract, there is not merely a broken promise, but, outside of and beyond that, there is trust betrayed and confidence abused. There is constructive fraud, or a negligence that operates as such; and it is that fraud and that negligence which, at bottom, makes the breach of contract actionable as a tort. *Coggs v. Bernard*, 2 Ld. Raym. 909; *Orange Bank v. Brown*, 3 Wend. 161, 162.

So far we see no reason to disagree with the learned counsel for the respondent save in one respect, but that is a very important one. Ending the argument at this point leaves the problem of the case still unsolved. If a cause of action for a tort, as admitted, was stated in the complaint, it helps us but little to learn what it was not, and that it does not fall within a certain class of exceptional cases, and cannot be explained by them. We have yet to understand what it is, if it exists at all, as a necessary preliminary to any just appreciation of the relevancy or materiality of the rejected evidence. The general term, as we have remarked, described the tort pleaded as a "clear case of fraud." If that be true, it cannot depend upon a fiduciary or other character of the relation constituted by the contract merely for no such relation existed; and there must be some other relation not created by the contract alone from which sprang the duty which was violated. Let us analyze the tort alleged somewhat more closely.

At the date of the contract the complaint shows the relative situation and needs of the two parties. The railroad company desired to close the draw over the Nepperhan river, and substitute a solid bridge. With the growth of its business, and the multitude of its trains, the draw had become a very great evil, and a serious danger. The effort to dispense with it was in itself natural and entirely proper. On the other hand, the plaintiff was both a riparian owner above the draw and likely to be injured in that ownership by a permanent bridge, and had suffered and was still suffering from a severe depreciation in the value of his property near Main street by the previous removal of the rail-

road station. The defendant was so far master of the situation that it could and did shut up the plaintiff to a choice of evils. He might insist upon the draw and leave his mortgaged property to be lost from depreciation, and save his riparian right, or he might surrender the latter to save the former. The last was the alternative which he selected, and the contract of 1877 was the result. In the making of this contract there was no deceit or fraud and no legal or actionable wrong on the part of the defendant. If it drove a hard bargain and had the advantage in the negotiation, it at least invaded no legal right of the plaintiff and he was free to contract or not as he pleased. The complaint does not allege that at the execution of this agreement there was any purpose or intention of not fulfilling its terms. The tort, if any, originated later. What remains then is this: The railroad company conceived the idea of closing Main street to any travel where it passed their tracks at grade; of substituting a bridge crossing in its stead; and of fencing in its track along the street beneath, so as to compel access to the cars through its depot in such manner that the purchase of tickets could be compelled. This in itself was a perfectly lawful purpose. The grade crossing was a death trap, and the interest of the company and the safety of individuals alike made a change desirable, and the closing in of the depot was in no sense reprehensible. But there was a difficulty in the way. The plaintiff again stood as an obstacle in the path. The closing of Main street, though beneficial to the company, was to him and his adjoining property claimed to be a very serious injury. He declined to consent, except upon the condition of an award of heavy damages, and in dread of that peril the common council refused to pass the necessary ordinance. At this point, according to the allegations of the complaint, if at all or ever, arose the tort. It is alleged that the defendant, in order to reach a lawful result, planned a fraudulent scheme for its accomplishment by unlawful means, and through an injury to the plaintiff, which would strip him of his damages by a complete sacrifice of his property. That plan was executed in this manner: The company willfully and purposely refused to perform its contract. It had built its permanent bridge over the Nepperhan, and so received the full considerations of its promise; its new depot was substantially finished and ready for occupation; and no just reason remained why its contract should not be fulfilled. But the company refused. It did not merely neglect or delay; it openly and publicly refused. The purpose of that public refusal was apparent. It was to drive the plaintiff's mortgagee to a foreclosure; it was to shut out from plaintiff that appreciation of his property which would enable him to save it; it was to strip him of it, so as to extinguish the threatened damages, and thus procure the assent of the common council, and get Main street closed. This unlawful refusal to perform the contract, this deliberate announcement of the purpose not to restore the depot, was well calculated to influence the mortgagee towards a foreclosure. But the defendant's direct instigation was add-

ed. The foreclosure came; the mortgagee bid in the property at a sacrifice; swiftly followed a release of damages, an ordinance of the common council, the closing of Main street, and then the restoration of the depot.

We are thus able to see what the tort pleaded was. It was not a constructive fraud, drawn from a violation of a duty imposed by law out of some specific relation of trust and confidence, but an actual and affirmative fraud—an alleged scheme to accomplish a lawful purpose by unlawful means. There was here, on the theory of the complaint, something more than a mere breach of contract. That breach was not the tort; it was only one of the elements which constituted it. Beyond that, and outside of that, there was said to have existed a fraudulent scheme and device by means of that breach to procure the foreclosure of the mortgage at a particular time and under such circumstances as would make that foreclosure ruinous to the plaintiff's rights, and remove him as an obstacle by causing him to lose his property, and thereby his means of resistance to the purpose ultimately sought. In other words, the necessary theory of the complaint is that a breach of contract may be so intended and planned; so purposely fitted to time and circumstances and conditions; so interwoven into a scheme of oppression and fraud; so made to set in motion innocent causes which otherwise would not operate—as to cease to be a mere breach of contract, and become, in its association with the attendant circumstances, a tortious and wrongful act or omission.

It may be granted that an omission to perform a contract obligation is never a tort, unless that omission is also an omission of a legal duty. But such legal duty may arise, not merely out of certain relations of trust and confidence, inherent in the nature of the contract itself, as in the case referred to in the respondent's argument, but may spring from extraneous circumstances, not constituting elements of the contract as such, although connected with and dependent upon it, and born of that wider range of legal duty which is due from every man to his fellow, to respect his rights of property and person, and refrain from invading them by force or fraud. It has been well said that the liability to make reparation for an injury rests, not upon the consideration of any reciprocal obligation, but upon an original moral duty enjoined upon every person so to conduct himself, or exercise his own rights, as not to injure another. *Kerwhacker v. C., C. & C. R. R. Co.*, 3 Ohio St. 188, 62 Am. Dec. 246. Whatever its origin, such legal duty is uniformly recognized, and has been constantly applied as the foundation of actions for wrongs; and it rests upon and grows out of the relations which men bear to each other in the framework of organized society. It is then doubtless true that a mere contract obligation may establish no relation out of which a separate or specific legal duty arises and yet extraneous circumstances and conditions, in connection with it, may establish such a relation as to make its performance a legal duty, and its omission a wrong to be redressed. The duty and the tort

grow out of the entire range of facts, of which the breach of the contract was but one. The whole doctrine is accurately and concisely stated in 1 Chit. Pl. 135, that, "if a common-law duty result from the facts, the party may be sued in tort for any negligence or misfeasance in the execution of the contract." It is no difficulty that the mortgagee's agreement to give time, and postpone the sale for plaintiff's benefit, was invalid, and a mere act of grace which could not have been compelled. If it is made plain that the mortgagee would have waited but for the fraudulent scheme and conduct of the defendant, that is enough. *Benton v. Pratt*, 2 Wend. 385, 20 Am. Dec. 623; *Rice v. Manley*, 66 N. Y. 83, 23 Am. Rep. 30. Nor is it a difficulty that the injury suffered was the result of a series of acts, some of which were lawful and innocent. *Cooley on Torts*; *Bebinger v. Sweet*, 1 Abb. N. C. 263.

Assuming, now, that we correctly understand what the tort pleaded was, and which was conceded to constitute a cause of action, it seems to us quite clear that the plaintiff was improperly barred from proving it. From the very nature of the case, a fraud can seldom be proved directly, and almost uniformly is an inference from the character of the whole transaction, and the surrounding and attendant circumstances. Proof of the contract, and its breach, of the delay in restoring of the depot, and the reasons therefor, were essential links in the chain. If the proof should go no further, a nonsuit would be proper, but without these elements the tort alleged could not be established at all. And so the situation of the parties as it respected their several properties, the existence of the mortgage, the agreement to postpone the sale, were elements of the transaction proper to be shown. * * *

The judgment should be reversed, and a new trial granted, costs to abide the event. All concur, except RAPALLO and MILLER, JJ., not voting.

Judgment reversed.

1. ELECTION OF REMEDY⁴

TERRY v. MUNGER.

(Court of Appeals of New York, 1890. 121 N. Y. 161, 24 N. E. 272, 8 L. R. A. 216, 18 Am. St. Rep. 803.)

PECKHAM, J.⁵ The plaintiffs commenced an action heretofore against two other persons, named, Kipp and Munger, on account of the same transaction for which this action was brought against

⁴ For discussion of principles, see Chapin on Torts, §§ 9, 10.

⁵ A portion of the opinion is omitted.

the above-named sole defendant. The character of the complaint in that action was before this court, and the case is reported in 88 N. Y. 629 (*Goodwin v. Griffis*). The defendants in that case were charged with detaching and carrying away from the mill the machinery in question in that case, and also in this, and using it for themselves. It was there held, upon a perusal of the complaint, that the action was of a nature *ex contractu*, and not *ex delicto*, for the wrong done plaintiffs by the conversion of their property. As the defendants therein had not, after their conversion of it, themselves sold or otherwise disposed of the property which they acquired from the plaintiffs, the fiction of the receipt by defendants of money for the sale of the property, which *ex æquo et bono* they ought to pay back to plaintiffs, and which they therefore impliedly promised to pay back, could not be indulged in, and the position of the parties would have been at one time the subject of some doubt, whether there was any foundation for the doctrine of an implied promise in such case, or any possibility of the waiver of the tort committed by the defendants in the conversion of the property. In some of the states it has been denied, and such denial placed upon the ground that the property remained in the hands of the wrongdoer, and therefore, no money having been received by him in fact, an implied promise to pay over money had and received by defendant to the plaintiff's use did not and could not arise. Such was the case of *Jones v. Hoar*, 5 Pick. (Mass.) 285. But the great weight of authority in this country is in favor of the right to waive the tort, even in such case. If the wrongdoer has not sold the property, but still retains it, the plaintiff has the right to waive the tort, and proceed upon an implied contract of sale to the wrongdoer himself, and in such event he is not charged as for money had and received by him to the use of the plaintiff. The contract implied is one to pay the value of the property as if it had been sold to the wrongdoer by the owner. If the transaction is thus held by the plaintiff as a sale, of course the title to the property passes to the wrongdoer, when the plaintiff elects to so treat it. See *Pom. Rem.* (2d Ed.) §§ 567-569; *Putnam v. Wise*, 1 Hill, 234, 240, and note by Mr. Hill, 37 Am. Dec. 309; *Berly v. Taylor*, 5 Hill, 577, 584; *Norden v. Jones*, 33 Wis. 600, 605, 14 Am. Rep. 782; *Cummings v. Vorce*, 3 Hill, 283; *Spoor v. Newell*, Id. 307; *Abbott v. Blossom*, 66 Barb. 353. We think this rule should be regarded as settled in this state. The reasons for the contrary holding are as well stated as they can be in the case above cited from Massachusetts (5 Pick.), and some of the cases looking in that direction in this state are cited in the opinion of Talcott, J., in the case reported in 66 Barb., *supra*. We think the better rule is to permit the plaintiff to elect, and to recover for goods sold, even though the tort-feasor has not himself disposed of the goods. * * *

III. Statutory Torts ⁶

WILLY v. MULLEDY.

(Court of Appeals of New York, 1879. 78 N. Y. 310, 34 Am. Rep. 536.)

EARL, J. This is an action to recover damages for the death of plaintiff's wife, alleged to have been caused by the fault of the defendant. Prior to the 1st day of November, 1877, the plaintiff hired of the defendant certain apartments in the rear of the third story of a tenement house in the city of Brooklyn, and with his wife and infant child moved into them on that day. On the 5th day of the same month, in the daytime, a fire took place, originating in the lower story of the house, and plaintiff's wife and child were smothered to death.

It is claimed that the defendant was in fault because he had not constructed for the house a fire escape, and because he had not placed in the house a ladder for access to the scuttle. Section 36, tit. 13, c. 863, Laws 1873, provides that every building in the city of Brooklyn shall have a scuttle or place of egress in the roof thereof of proper size, and "shall have ladders or stairways leading to the same; and all such scuttles and stairways or ladders leading to the roof shall be kept in readiness for use at all times." It also provided that houses like that occupied by the plaintiff "shall be provided with such fire escapes and doors as shall be directed and approved by the commissioners [of the department of fire and buildings]; and the owner or owners of any building upon which any fire escapes may now or hereafter be erected shall keep the same in good repair, and well painted, and no person shall at any time place any incumbrance of any kind whatsoever upon said fire escapes now erected, or that may hereafter be erected, in the city. Any person, after being notified by said commissioners, who shall neglect to place upon any such building the fire escape herein provided for shall forfeit the sum of \$500, and shall be deemed guilty of a misdemeanor." Under this statute the defendant was bound to provide this house with a fire escape. He was not permitted to wait until he should be directed to provide one by the commissioners. He was bound to do it in such way as they should direct and approve, and it was for him to procure their direction and approval. No penalty is imposed for the simple omission to provide one. The penalty can be incurred only for the neglect to provide one after notification by the commissioners. Here was, then, an absolute duty imposed upon the defendant by statute to provide a fire escape, and the duty was imposed for the sole benefit of the tenants of the house,

⁶ For discussion of principles, see Chapin on Torts, § 11.

so that they would have a mode of escape in the case of a fire. For a breach of this duty causing damage, it cannot be doubted that the tenants have a remedy. It is a general rule that whenever one owes another a duty, whether such duty be imposed by voluntary contract or by statute, a breach of such duty causing damage gives a cause of action. Duty and right are correlative, and where a duty is imposed there must be a right to have it performed. When a statute imposes a duty upon a public officer, it is well settled that any person having a special interest in the performance thereof may sue for a breach thereof causing him damage, and the same is true of a duty imposed by statute upon any citizen. *Cooley on Torts*, 654; *Hover v. Barkhoof*, 44 N. Y. 113; *Jetter v. N. Y. C. & H. R. R. Co.*, 2 Abb. Dec. 458; *Heeney v. Sprague*, 11 R. I. 456, 23 Am. Rep. 502; *Couch v. Steel*, 3 Ell. & Bl. 402. In *Comyn's Digest*, "Action upon Statute" (F), it is laid down as the rule that, "in every case where a statute enacts or prohibits a thing for the benefit of a person, he shall have a remedy upon the same statute for the thing enacted for his advantage, or for the recompense of a wrong done to him contrary to the said law." There was no fire escape for this house. But the claim is made on behalf of this defendant that he is not liable in this action, because the plaintiff and his wife knew, when they moved into the house and while they occupied the same, that there was no fire escape, and hence that they voluntarily took the hazard of its absence. It is undoubtedly true that the plaintiff could have stipulated against or have waived the performance of this duty imposed for his benefit, but this he did not do. There is no proof of any kind that it was the intention of the parties entering into their contract that he should take and occupy this house without a fire escape. There is nothing to show that he knew there was no fire escape there when he hired the apartments. It is not shown that his attention was in any way called to the matter or that he looked for one. Its absence could be discovered only by an examination outside of the house, and there is no evidence that he made such examination. He had the right to assume that the statutory duty had been performed. There is no proof that during his occupancy he discovered the absence of a fire escape. He was there but three days, excluding the day upon which he moved in and the day upon which the fire occurred, and during that time it does not appear how much of the time he was in the house. There is certainly no evidence that he or his wife discovered that there was no fire escape, or that their attention had been called to the matter. They owed no duty to the defendant to look and see whether there was one there or not. They had the right to rely upon its presence there as required by the statute. But suppose they did discover that there was no fire escape at some time while there, after they moved in; does such discovery absolve the defendant from his duty? After making the discovery, they were not bound at once to leave the house and go into the

street. They had a reasonable time to look for and move into other apartments; and by remaining for such reasonable time they waived nothing; and, if they did not choose to move out, they were entitled to a reasonable time to find the defendant and to call upon him to furnish the fire escape. By remaining in the house for such reasonable time after discovery of the breach of duty on the part of the defendant, it could not be said as matter of law that they waived the performance thereof, or took upon themselves voluntarily the hazard of all the damages which they might sustain by the nonperformance thereof. The duty rested upon the defendant not solely to have a fire escape there when the plaintiff leased the premises, but it continued to rest upon him; and, before it could be held that the plaintiff absolved him in any way from this duty, the proof should be clear and satisfactory. Here, I hold, there was no proof whatever from which it could properly have been found that he did so absolve him.

But it was needful for the plaintiff to show, not only that there was this breach of duty, but that the death of plaintiff's wife was due to such breach; that is, that her life would have been saved if there had been a fire escape there. It is reasonably certain that if the defendant had placed the fire escape at the rear of the house, constructed as they were required to be, that the deceased would have seen it, and made her escape, as it would have been at one of the windows of the rear rooms which she occupied. But it is said that the defendant was not bound to place the fire escape at the rear of his house, but that he could have placed it in the front of his house, and that if he had placed it there she could not have escaped. It is probably true that she could not have escaped from the front of the house. But there is no proof where fire escapes are usually constructed, nor whether the front or rear of this particular house would have been the more suitable place for the fire escape. I think we may assume from the manner in which the front part of this house was constructed, and from the structure of fire escapes, that it is most probable that it would have been placed on the rear of the house. We think upon the whole case there was enough to authorize the jury to find that the deceased would have escaped, if the defendant had discharged his duty as the law required.

Many of the observations already made apply to the ladder for the scuttle. The duty to furnish and keep such a ladder was imposed mainly for the benefit of the tenants. It was the intention of the statute that they should have two means of escape in the case of fire, one by the scuttle and another by the fire escape. It was the duty of the defendant to provide a ladder, and then to use reasonable care to keep it there in readiness for use. The defendant had once provided a ladder for this scuttle, but for many months before this fire there had been none there. This the plaintiff and his wife did not know. They knew where the scuttle was, and they had the right to suppose

that there was a ladder to reach it, as the law requires. Hence there was, or at least the jury had the right to find that there was, a breach of duty in this respect. But the claim is also made as to this that there was not sufficient evidence to authorize the jury to find that the breach of this duty had any connection with the death of plaintiff's wife; that her life would have been saved if the ladder had been there. We think there was. The evidence was not very satisfactory. It is true that much is left, from the necessity of the case, to the weighing of probabilities. But the jury could find that the deceased knew where the scuttle was; that she had time after notice of the fire to reach it; and that, as she was making efforts to escape, she probably tried to escape in that direction, and failed for want of the ladder. There was sufficient evidence, therefore, to authorize a verdict for the plaintiff, and we do not think the judgment should be reversed for other errors alleged. * * *

The judgment must be affirmed with costs. All concur. Judgment affirmed.

STRONG v. CAMPBELL.

(Supreme Court of New York, 1851. 11 Barb. 135.)

Demurrer to declaration. The declaration alleged that on the 1st day of December, 1847, the defendant was postmaster at the city of Rochester, and as such it became and was his duty, by force of the statute in such case made and provided, to advertise letters uncalled for at his office in the newspaper published at Rochester having the largest circulation; that there was at that time in said office a large number of letters uncalled for, which it was the duty of the defendant to advertise; that the plaintiffs then were, and ever since have been, the publishers and proprietors of a newspaper, printed and published daily in the city of Rochester, called the Rochester Daily Democrat, which paper then had, and ever since has continued to have, the largest circulation of any newspaper printed and published at Rochester, and were ready and willing to advertise the said letters at the price fixed by law. Yet the defendant, well knowing the premises, but contriving and wrongfully, maliciously and unjustly intending to injure and aggrieve the plaintiffs in that behalf, wrongfully, maliciously and unjustly refused and neglected to publish the letters uncalled for at his office in the paper so published by the plaintiffs; whereby the plaintiffs were deprived of the profits and advantage which would otherwise have accrued to them from the printing of the said letters. The defendant demurred.^a

⁷ The remainder of the opinion is omitted.

^a The statement of facts is abridged.

JOHNSON, J. I have not deemed it necessary to examine the questions raised as to the sufficiency of the averments in the declaration conceding the action to be maintainable, because in my judgment there is no foundation whatever in law for an action, under any conceivable state of pleading, for such a cause. I think no case or precedent can anywhere be found which gives it the least countenance or support. This of itself would afford a very strong presumption against the right of action. But the position does not rest upon mere negative inferences. The authorities, I apprehend, will be found, on examination, to be abundant and conclusive against the right of action for the cause alleged.

The cause alleged is a breach of duty on the part of the defendant as a postmaster, in refusing to receive the proofs offered by the plaintiffs in regard to the circulation of their paper, and to give them the publishing of the list of letters remaining in the post office at Rochester, according to the act of congress and the instructions of the postmaster general, whereby they lost the employment and the gains and profits arising therefrom.

To give a right of action for such a cause, the plaintiff must show that the defendant owed the duty to him personally. Wherever an action is brought for a breach of duty imposed by statute, the party bringing it must show that he had an interest in the performance of the duty, and that the duty was imposed for his benefit. But where the duty was created or imposed for the benefit of another, and the advantage to be derived to the party prosecuting, by its performance, is merely incidental and no part of the design of the statute, no such right is created as forms the subject of an action. In this I apprehend all the authorities will be found to agree. *Martin v. Mayor*, etc., of Brooklyn, 1 Hill, 545; *Bank of Rome v. Mott*, 17 Wend. 556, 19 Vin. Ab. 518, 520; 1 Salk. 19; *Ashby v. White*, 6 Mod. 51. In the latter case Holt, Chief Justice, laid down the rule that it must be shown that the party had a right vested in him, in order to maintain the action. And this I apprehend is the true rule. It must be an absolute vested right or interest in contradistinction to one incidental and contingent. The case of *Foster v. McKibben*, Postmaster of Pittsburgh, in the district court of Alleghany county (reported in the *American Law Journal*, new series, vol. 1, p. 411), is directly in point. The case is nearly in its facts identical with this, and the court held that the action could not be maintained. That case is authority so far only as its reasoning is sound. But the reasons given by the judge who delivered the opinion of the court will commend themselves to every legal mind, with the weight and force of authority. It is unquestionably the duty of every officer to perform every duty imposed upon him by law, in the manner and to the extent prescribed, and he may be punished for every violation to the injury of the public or that of individuals. But it does not follow that some one has a right of action

against him for every neglect or violation of duty to recover private damages.

Now for whose benefit was the act of congress under consideration passed, and the instructions of the postmaster general given? Not surely that publishers of newspapers might be enabled to obtain profitable employment, and receive emoluments from the public treasury. That was no part of the design of the lawmakers. The design of the law obviously was, first, to benefit persons receiving communications through the post office, by giving the widest possible notice that letters remained on hand ready for delivery; and, secondly, to secure the greatest amount of revenue to the département by the delivery of letters and the receipt of postage thereon, which might otherwise never be called for, and consequently be returned to the dead letter office. These plaintiffs had no direct interest in the observance of the law and the regulations of the department, except as they received letters at this office. Every person to whom letters were or might be addressed at this office had an interest in the performance of this duty. Whether such persons could maintain an action for a breach of this character, it is not necessary now to consider. But it is clear, I think, that these plaintiffs, as publishers of a newspaper, in which character they claim, had no such interest as gives a right of action. As connected with their paper they were not within the purview of the statute, except incidentally. It secured to them no fixed and absolute right, and imposed upon them no duty whatever. They were under no obligation to publish the list when offered, and their refusal would have involved no liability to any one. They might make a profit by the performance of the duty, but they sustain no loss by its nonperformance. They would not be injured, in any legal sense, by a repeal of the law. We have many statutory regulations requiring notices in various legal proceedings, in sales upon executions, and the foreclosure of mortgages, to be published some in the state paper and others in newspapers printed in the county. Should the person whose duty it was to publish these notices publish in the wrong paper, and the person for whose benefit the proceeding was instituted or carried on thereby lose the benefit of the proceeding, and sustain an injury, undoubtedly such person might bring his action and recover his damages. But was it ever heard or claimed before that the proprietor of the paper in which the notice should properly have been published had any such right or interest in the matter as would entitle him to maintain an action to recover the profits which the publication in his paper would have brought him? That would be a parallel case. The interest is too remote and contingent to be the foundation of a right of which the law takes cognizance.

The action is altogether misconceived, and the defendant must have judgment upon the demurrer.

IV. Cases of Novel Impression *

KUJEK v. GOLDMAN:

(Court of Appeals of New York, 1896. 150 N. Y. 176, 44 N. E. 773, 34 L. R. A. 156, 55 Am. St. Rep. 670.)

Prior to January 17, 1891, the defendant Katie Kujek, then named Katie Moritz, was an unmarried woman employed as a domestic in the family of the defendant Goldman, by whom she had become pregnant. Upon discovering the fact, the defendants, as it is alleged in the complaint, conspired to conceal their disgrace, and to induce the plaintiff to marry the said Katie, and to that end represented to him that she was a virtuous and respectable woman, and he, believing the same, did marry her on the day last named. The plaintiff, as it was further alleged, would not have contracted said marriage if he had known the facts. Subsequently, and on July 29, 1891, owing to such pregnancy, she gave birth to a child, of which said Goldman was the father. The answer of Goldman was, in substance, a general denial. No answer was served by the other defendant, and no judgment was taken against her. The evidence tended to sustain the allegations of the complaint.

VANN, J. (after stating the facts). The verdict of the jury has established as the facts of this case, beyond our power to review, that the plaintiff married Katie Moritz in the belief that she was a virtuous girl, induced by the representations of the defendant to that effect, when in fact she was at the time pregnant by the defendant himself. The case was submitted to the jury upon the theory that if Goldman, knowing that Katie was unchaste, by false representations that she was virtuous induced the plaintiff to marry her, he was entitled to recover damages, and the jury found a verdict in his favor for \$2,000. While no precedent is cited for such an action, it does not follow that there is no remedy for the wrong, because every form of action, when brought for the first time, must have been without a precedent to support it. Courts sometimes of necessity abandon their search for precedents, and yet sustain a recovery upon legal principles clearly applicable to the new state of facts, although there was no direct precedent for it, because there had never been an occasion to make one. In remote times, when actions were so carefully classified that a mistake in name was generally fatal to the case, a form of remedy was devised by the courts to cover new wrongs as they might occur, so as to prevent a failure of justice. This was called an "action on the case," which was employed where the right to sue resulted from the peculiar circumstances of the case, and for which the other forms of action gave

* For discussion of principles, see Chapin on Torts, § 15.

no remedy. 26 Am. & Eng. Enc. Law, 694. For instance, the action for enticing away a man's wife, now well established, was at first earnestly resisted upon the ground that no such action had ever been brought. In an early case the court answered this position by saying: "The first general objection is that there is no precedent of any such action as this, and that, therefore, it will not lie; and the objection is founded on Litt. § 108, and Co. Litt. 81b, and several other books. But this general rule is not applicable to the present case. It would be if there had been no special action on the case before. A special action on the case was introduced for this reason: That the law will never suffer an injury and a damage without a remedy, but there must be new facts in every special action on the case." *Winsmore v. Greenbank*, Willes, 577, 580. As was recently said by this court in an action then without precedent: "If the most that can be said is that the case is novel, and is not brought plainly within the limits of some adjudged case, we think such fact not enough to call for a reversal of the judgment." *Piper v. Hoard*, 107 N. Y. 73, 76, 13 N. E. 626, 629 (1 Am. St. Rep. 789). The question therefore is not whether there is any precedent for the action, but whether the defendant inflicted such a wrong upon the plaintiff as resulted in lawful damages. The defendant by deceit induced the plaintiff to enter into a marriage contract, whereby he assumed certain obligations, and became entitled to certain rights. Among the obligations assumed was the duty of supporting his wife in sickness and in health, and he discharged this obligation by expending money to fit up rooms for housekeeping, in keeping house with his wife, and caring for her during confinement, when she bore a child, not to him, but to the defendant. Among the rights acquired was the right to his wife's services, companionship, and society. By the fraudulent conduct of the defendant, he was not only compelled to expend money to support a woman whom he would not otherwise have married, but was also deprived of her services while she was in childbed. He thus sustained actual damages to some extent; and as the wrong involved not only malice, but moral turpitude also, in accordance with the analogies of the law upon the subject the jury had the right to make the damages exemplary. By thus applying well-settled principles upon which somewhat similar actions are founded, this action can be sustained, because there was a wrongful act in the fraud, that was followed by lawful damages, in the loss of money and services. The fact that the corruption of the plaintiff's wife was before he married her does not affect the right of action, as the wrong done to him was not by her defilement, but by the representation of the defendant that she was pure when he knew that she was impure, in order to bring about the marriage. It is difficult to see why a fraud which, if practiced with reference to a contract relating to property merely, would support an action, should not be given the same

effect when it involves a contract affecting, not only property rights, but also the most sacred relation of life. Fraudulent representations with reference to the amount of property belonging to either party to a proposed marriage, made by a third person for the purpose of bringing about the marriage, are held to constitute an actionable wrong, and the usual remedy is to require the person guilty of the fraud to make his representations good. *Piper v. Hoard*, *supra*; *Montefiori v. Montefiori*, 1 W. Bl. 363, Ath. Mar. Sett. 484. In such cases the injury is more tangible, and the measure of damages more readily applied, than in the case before us; but both rest upon the principle that he who by falsehood and fraud induces a man to marry a woman is guilty of a wrong that may be remedied by an action, the amount of damages to be recovered depending upon the circumstances of the particular case.

We have thus far considered the right of action as resting upon some pecuniary loss, which, although trifling in amount, may be recovered as a matter of right, leaving it to the jury, in their sound discretion, as in a case for the seduction of a child or servant, to amplify the damages by way of punishment and example. We think, however, that the action can be maintained upon a broader and more satisfactory ground, and that is the loss of consortium, or the right of the husband to the conjugal fellowship and society of his wife. The loss of consortium through the misconduct of a third person has long been held an actionable injury, without proof of any pecuniary loss. *Bennett v. Bennett*, 116 N. Y. 584, 23 N. E. 17, 6 L. R. A. 553; *Hutcheson v. Peck*, 5 Johns. 196; *Hermance v. James*, 32 How. Prac. 142. As has been well said by a recent writer: "To entice away, or corrupt the mind and affection of, one's consort, is a civil wrong, for which the offender is liable to the injured husband or wife. The gist of the action is not in the loss of assistance, but the loss of consortium of the wife or husband, under which term are usually included the person's affection, society, or aid." Bigelow, *Torts*, 153. The damages are caused by the wrongful deprivation of that to which the husband or wife is entitled by virtue of the marriage contract. They rest upon the loss of a right which the marriage relation gives, and of which it is an essential feature. Whether that right is wrongfully taken away after it is acquired, or the person entitled to it is wrongfully prevented from acquiring it, does not change the effect or lessen the injury. While the plaintiff has not been actually deprived of the society of his wife, he has been deprived of that which made her society of any value, the same as if she had been seduced after marriage. Although the formal right to consortium may remain, the substance has been taken away. In other words, when he entered into the marriage relation he was entitled to the company of a virtuous woman, yet through the fraud of the defendant that right never came to him. He has never enjoyed the chief benefit springing from the contract of mar-

riage, which is the comfort, founded upon affection and respect, derived from conjugal society. If the defendant had deprived the plaintiff of his right to consortium after marriage, the law would have afforded a remedy by the award of damages. Yet the plaintiff, through the fault of the defendant, has suffered a loss of the same nature and to the same extent, except that, instead of losing what he once had, he has been prevented from getting it when he was entitled to it. This is a difference in form only, and is without substantial foundation. The injury, although effected by fraud before marriage, instead of by seduction after marriage, was the same, and why should not the remedy be the same? While the method of inflicting the injury is not the same, as it is tortious in character, has substantially the same effect, and causes damages of the same nature and to the same extent, why should damages be recovered in the one case if not in the other? Where false representations are willfully made as to a material fact, for the purpose of inducing another to act upon them, and he does so act to his injury, he may recover such damages as proximately result from the deception. The representations in this case, as the jury has found, were made to promote the marriage, and they were false, as the defendant well knew. They were clearly material. The plaintiff acted upon them, and was thereby injured; for he made a contract entitling him to certain rights, which he has not received, and which the defendant knew he could never receive. Here are all the elements of a good cause of action founded upon fraud resulting in damage. The contract induced by the fraud was of a peculiar nature, but it was in law simply a contract, conferring certain rights, and imposing certain obligations. While it is not agreeable to treat a subject of sacred importance upon this narrow basis, it is necessary to do so, for our law considers marriage in no other light than as a civil contract. If the defendant had induced the plaintiff to enter into any other contract by making false statements of fact, which if true would have made the contract more valuable, he would have been liable for all the damages that naturally resulted. If he had induced the very marriage contract under consideration by representing to the plaintiff that he owed his proposed wife a certain sum of money, according to the common law, which entitles the husband to the personal property of his wife, he could have been compelled to make his representations good by the payment of that sum. *Montefiori v. Montefiori*, supra; *Redman v. Redman*, 1 Vern. 348; *Neville v. Wilkinson*, 1 Brown, Ch. Cas. 543; *Scott v. Scott*, 1 Cox, 378. These cases, as well as the more important case of *Piper v. Hoard*, supra, rest upon the principle that fraudulent representations as to the pecuniary condition of one party to a proposed marriage, made by a third person to the other party thereto, in order to promote the marriage, are actionable, and authorize the recovery of such damages as may be proved. In this case we have a representation that did not relate to property directly, although it involved rights

in the nature of property, but did relate to character, and so vitally that its falsity was destructive of all happiness belonging to the plaintiff by virtue of his marriage. The injury was not merely sentimental, for, as has been shown, it extended to a right which the law recognizes as of pecuniary value, and for the wrongful destruction of which it awards damages. We think that the facts found warrant the recovery, and, after examining all the exceptions, are of the opinion that the judgment should be affirmed, with costs. All concur, except BARTLETT, J., not voting. Judgment affirmed.

RESPONSIBILITY AS DEPENDENT UPON CONDITION OF MIND

I. Voluntary Acts¹1. ACCIDENT²

STANLEY v. POWELL.

(Queen's Bench Division, [1891]. 1 Q. B. D. 86.)

DENMAN, J. This case was tried before me and a special jury at the last Maidstone Summer Assizes.

In the statement of claim the plaintiff alleged that the defendant had negligently and wrongfully and unskilfully fired his gun and wounded the plaintiff in his eye, and that the plaintiff, in consequence, had lost his sight and suffered other damage. The defendant denied the negligence alleged. After the evidence on both sides, which was conflicting, had been heard, I left the three following questions to the jury: 1. Was the plaintiff injured by a shot from defendant's gun? 2. Was the defendant guilty of negligence in firing the charge to which that shot belonged as he did? 3. Damages.

The undisputed facts were that on November 29, 1888, the defendant and several others were pheasant shooting in a party, some being inside and some outside of a wood which the beaters were beating. The right of shooting was in one Greenwood, who was of the party. The plaintiff was employed by Greenwood to carry cartridges and the game which might be shot. Several beaters were driving the game along a plantation of saplings towards an open drive. The plaintiff stood just outside a gate which led into a field outside the plantation at the end of the drive. The defendant was walking along in that field a few yards from the hedge which bounded the plantation. As he was walking along a pheasant rose inside the plantation; the defendant fired one barrel at this bird, and, according to the evidence for the defendant, struck it with his first shot. There was a considerable conflict of evidence as to details; but the jury must, I think, be taken to have adopted the version of the facts sworn to by the defendant's witnesses. They swore that the bird, when struck by the first shot, began to lower and turn back towards the beaters, whereupon the defendant fired his second barrel and killed the bird, but that a shot, glancing from the bough of an oak which was in or close to the hedge, and striking the plaintiff, must have caused the injury com-

¹ For discussion of principles, see Chapin on Torts, §§ 17-25.

² For discussion of principles, see Chapin on Torts, § 17.

plained of. The oak in question, according to the defendant's evidence, was partly between the defendant and the bird when the second barrel was fired, but it was not in a line with the plaintiff, but, on the contrary, so much out of that line that the shot must have been diverted to a considerable extent from the direction in which the gun must have been pointed in order to hit the plaintiff. The distance between the plaintiff and the defendant, in a direct line, when the second barrel was fired, was about thirty yards. The case for the plaintiff was entirely different; but I think it must be held that the jury took the defendant's account of the matter, for they found the second question left to them in the negative. Before summing up the case to the jury, I called the attention of the parties to the doctrine which seemed to have been laid down in some old cases, that, even in the absence of negligence, an action of trespass might lie; and it was agreed that I should leave the question of negligence to the jury, but that, if necessary, the pleadings were deemed to have been amended so as to raise any case or defence open upon the facts with liberty to the court to draw inferences of fact, and that the damages should be assessed contingently. The jury assessed them at £100. I left either party to move the court for judgment; but it was afterwards agreed that the case should be argued before myself on further consideration, and that I should give judgment, notwithstanding that I had left the parties to move the court, as though I had originally reserved it for further consideration before myself.

Having heard the arguments, I am of opinion that by no amendment that could be made consistently with the finding of the jury could I properly give judgment for the plaintiff. It was contended on his behalf that this was a case in which an action of trespass would have lain before the Judicature Acts; and this contention was mainly founded on certain dicta which, until considered with reference to those cases in which they are uttered, seem to support that contention; but no decision was quoted, nor do I think that any can be found which goes so far as to hold, that if A. is injured by a shot from a gun fired at a bird by B., an action of trespass will necessarily lie, even though B. is proved to have fired the gun without negligence and without intending to injure the plaintiff or to shoot in his direction.

The jury having found that there was no negligence on the part of the defendant, the most favorable way in which it is now possible to put the case for the plaintiff is to consider the action as brought for a trespass, and to consider that the defendant has put upon the record a defence denying negligence, and specifically alleging the facts sworn to by his witnesses, which the jury must be considered to have found proved, and then to consider whether those facts, coupled with the absence of negligence established by the jury, amount to an excuse in law.

The earliest case relied upon by the plaintiff was one in the year book

21 Hen. 7, 28 A., which is referred to by Grose, J., in the course of the argument in *Leame v. Bray*, 3 East, 593, to be mentioned presently in these words: "There is a case put in the year book 21 Hen. 7, 28 A., that where one shot an arrow at a mark which glanced from it and struck another, it was holden to be trespass." Returning to the case in the year book, it appears that the passage in question was a mere dictum of Rede, who (See 5 Foss' Lives of the Judges, p. 230) was at the time (1506) either a judge of the King's Bench or C. J. of the Common Pleas, which he became in October in that year, in a case of a very different kind from that in question, and it only amounts to a statement that an action of trespass may lie even where the act done by the defendant is unintentional. The words relied on are, "*Mes où on tire à les buts et blesse un home, coment que est incontre sa volonté, il sera dit un trespassor incontre son entent.*" But in that very passage Rede makes observations which show that he has in his mind cases in which that which would be *prima facie* a trespass may be excused. The next case in order of date relied upon for the plaintiff was *Weaver v. Ward*, Hob. 134, decided in 1607. There is no doubt that that case contains dicta which *per se* would be in favor of the plaintiff, but it also contains the following summing up of the law applicable to cases of unintentional injury by acts which are *prima facie* trespasses: "Therefore no man shall be excused of a trespass * * * except it may be judged utterly without his fault"—showing clearly that there may be such cases. That case, after all, only decided that where the plaintiff and defendant were skirmishing as soldiers of the train-band, and the one, "*casualiter, et per infortunium, et contra voluntatem suam*" (which must be translated "accidentally and involuntarily"), shot the other, an action of trespass would lie, unless he could show that such involuntary and accidental shooting was done under such circumstances as utterly to negative negligence. Such cases may easily be supposed, in which there could be no two opinions about the matter; but other cases may, as the present case did, involve considerable conflicts of evidence and opinion which until recently a jury only could dispose of. The case of *Gibbons v. Pepper*, 4 Mod. 104, decided in 1695, merely decided that a plea merely showing that an accident caused by a runaway horse was inevitable was a bad plea in an action of trespass, because, if inevitable, that was a defence under the general issue. It was a mere decision on the pleading and laid down nothing as regards the point raised in the present case. The concluding words of the judgment which show clearly the *ratio decidendi* of that case are these: "He should have pleaded the general issue, for if the horse ran away against his will he would have been found not guilty, because in such a case it cannot be said with any color of reason to be a battery in the rider." The more modern cases of *Wakeman v. Robinson*, 1 Bing. 213, and *Hall v. Fearnley*, 3 Q. B. 919, lay down the same rule as regards the pleading point, though th-

former case may also be relied upon as an authority by way of dictum in favor of the plaintiff and the latter may be fairly relied upon by the defendant; for Wightman, J., in his judgment explains *Wakeman v. Robinson* thus: "The act of the defendant" (viz., driving the cart at the very edge of a narrow pavement on which the plaintiff was walking, so as to knock the plaintiff down) "was *prima facie* unjustifiable, and required an excuse to be shown. When the motion in this case was first made, I had in my recollection the case of *Wakeman v. Robinson*. It was there agreed that an involuntary act might be a defence on the general issue. The decision indeed turned on a different point; but the general proposition is laid down. I think the omission to plead the defence here deprived the defendant of the benefit of it, and entitled the plaintiff to recover."

But in truth neither case decides whether, where an act such as discharging a gun is voluntary, but the result injurious without negligence, an action of trespass can nevertheless be supported as against a plea pleaded and proved, and which the jury find established to the effect that there was no negligence on the part of the defendant.

The case of *Underwood v. Hewson*, 1 Str. 596, decided in 1724, was relied on for the plaintiff. The report is very short: "The defendant was uncocking a gun, and the plaintiff standing to see it, it went off and wounded him; and at the trial it was held that the plaintiff might maintain trespass *strange pro defendente*." The marginal note in Nolan's edition of 1795, not necessarily Strange's own composition, is this, "Trespass lies for an accidental hurt;" and in that edition there is a reference to Buller's N. P., p. 16. On referring to Buller, p. 16, where he is dealing with *Weaver v. Ward*, 14 Jac. 1, Hob. 134, I find he writes as follows: "So (it is no battery) if one soldier hurt another in exercise; but if he plead it he must set forth the circumstances, so as to make it appear to the court that it was inevitable, and that he committed no negligence to give occasion to the hurt, for it is not enough to say that he did it casualiter, et per infortunium, et contra voluntatem suam; for no man shall be excused of a trespass, unless it be justified entirely without his default, *Weaver v. Ward*; and therefore it has been holden that an action lay where the plaintiff standing by to see the defendant uncock his gun was accidentally wounded, *Underwood v. Hewson*," T. 10 Geo. 1 per Fortescue and Raymond in Midd., Str. 596. On referring back to *Weaver v. Ward*, I can find nothing in a defence in the case of a trespass it is necessary to show that the act was inevitable. If inevitable, it would seem that there was a defence under the general issue; but a distinction is drawn between an act which is inevitable and an act which is excusable, and what *Weaver v. Ward* really lays down is that "no man shall be excused of a trespass except it may be judged utterly without his fault."

Day v. Edwards, 5 T. R. 648, merely decides that where a man neg-

ligently drives a cart against the plaintiff's carriage, the injury being committed by the immediate act complained of, the remedy must be trespass, and not case.

But the case upon which most reliance was placed by the plaintiff's counsel was *Leame v. Bray*, 3 East, 593. That was an action of trespass in which the plaintiff complained that the defendant with force and arms drove and struck a chaise which he was driving on the highway against the plaintiff's curicle, which the plaintiff's servant was driving, by means whereof the servant was thrown out, and the horses ran away, and the plaintiff, who jumped out to save his life, was injured. The facts stated in the report include a statement that "the accident happened in a dark night, owing to the defendant driving his carriage on the wrong side of the road, and the parties not being able to see each other, and that if the defendant had kept his right side there was ample room for the carriages to have passed without injury." The report goes on to state: "But it did not appear that blame was imputable to the defendant in any other respect as to the manner of his driving. It was therefore objected for the defendant that, the injury having happened from negligence and not wilfully, the proper remedy was by an action on the case, and not of trespass *vi et armis*; and the plaintiff was thereupon nonsuited." On the argument of the rule to set aside the verdict the whole discussion turned upon the question whether injury was, as put by Lawrence, J., at page 596 of the report, immediate from the defendant's act, or consequential only from it, and in the result the nonsuit was set aside. But it clearly appears from the report that there was evidence upon which the jury might have found negligence, and indeed the defendant's counsel assumed it in the very objection which prevailed with Lord Ellenborough when he nonsuited the plaintiff. There is nothing in any of the judgments to show that if in that case a plea had been pleaded denying any negligence, and the jury had found that the defendant was not guilty of any negligence, but (for instance) that the accident happened wholly through the darkness of the night making it impossible to distinguish one side of the road from the other and without negligence on either side, the court would have held that the defendant would have been liable either in trespass or in case.

All the cases to which I referred were before the Court of Exchequer in 1875, in the case of *Holmes v. Mather*, Law Rep. 10 Ex. 261, and Bramwell, B., in giving judgment in that case, dealt with them thus: "As to the cases cited, most of them are really decisions on the form of action, whether case or trespass. The result of them is this, and it is intelligible enough: If the act that does an injury is an act of direct force *vi et armis*, trespass is the proper remedy (if there is any remedy), where the act is wrongful either as being wilful or as being the result of negligence. Where the act is not wrongful for either of these reasons, no action is maintainable, though trespass would be the

proper form of action if it were wrongful. That is the effect of the decisions."

This view of the older authorities is in accordance with a passage cited by Mr. Dickens from Bacon's Abridgment, Trespass, I., p. 706, with a marginal reference to *Weaver v. Ward*. In Bacon the word "inevitable" does not find a place. "If the circumstance which is specially pleaded in an action of trespass do not make the act complained of lawful" (by which I understand justifiable even if purposely done to the extent of purposely inflicting the injury, as, for instance, in a case of self-defence) "and only make it excusable, it is proper to plead this circumstance in excuse; and it is in this case necessary for the defendant to show not only that the act complained of was accidental" (by which I understand that the injury was unintentional), "but likewise that it was not owing to neglect or want of due caution." In the present case the plaintiff sued in respect of an injury owing to the defendant's negligence—there was no pretence for saying that it was intentional so far as any injury to the plaintiff was concerned—and the jury negatived such negligence. It was argued that nevertheless, inasmuch as the plaintiff was injured by a shot from the defendant's gun, that was an injury owing to an act of force committed by the defendant, and therefore an action would lie. I am of opinion that this is not so, and that against any statement of claim which the plaintiff could suggest the defendant must succeed if he were to plead the facts sworn to by the witnesses for the defendant in this case, and the jury, believing those facts, as they must now be taken by me to have done, found the verdict which they have found as regards negligence. In other words, I am of opinion that if the case is regarded as an action on the case for an injury by negligence the plaintiff has failed to establish that which is the very gist of such an action; if, on the other hand, it is turned into an action for trespass, and the defendant is (as he must be) supposed to have pleaded a plea denying negligence and establishing that the injury was accidental in the sense above explained, the verdict of the jury is equally fatal to the action. I am, therefore, of opinion that I am bound to give judgment for the defendant. As to costs, they must follow, unless the defendant foregoes his right. Judgment for the defendant.

II. Motive^{*}

RADER v. DAVIS.

(Supreme Court of Iowa, 1912. 154 Iowa, 306, 134 N. W. 849, 38 L. R. A. [N. S.] 131, Ann. Cas. 1914A, 1245.)

DEEMER, J.⁴ Plaintiff married one of defendant's daughters, Lillie Mae by name, in March of the year 1903, and as a result thereof one son was born in September of the year 1904. Because of plaintiff's ill treatment, the wife was compelled to leave him, and being without means she returned, with her son, to her father's home. Thereafter she commenced a divorce action against the plaintiff, and in September of the year 1905 she received a decree. * * * Plaintiff's former wife continued to live with defendant, her father, and some time in June of the year the child became sick, and as a result thereof died on or about July 16, 1909. Arrangements for the funeral were all made by the mother, and the defendant consented that it be held from his home. He at no time gave any directions as to how the services should be conducted or who should be permitted to attend; but there was enough testimony to justify a jury in finding that he, defendant, said to one Gray, who inquired for plaintiff as to whether or not he, plaintiff, could attend the funeral, "That he did not want them coming around him, and if they did they would do something they had not ought to do." Indeed, it is admitted in defendant's answer that at all times since the divorce decree was rendered he had denied plaintiff the right, privilege, or opportunity of entering in or upon his premises for any purpose. This denial of plaintiff's right to go upon the premises seems to have been due to the fact that, some time after the separation of plaintiff and his wife, he, plaintiff, and defendant had an altercation over the matter in which plaintiff assaulted the defendant and knocked him down in one of the streets of the city of Boone.

The decrees entered in the divorce case, from which we have quoted, were not appealed from and were therefore binding upon the plaintiff herein. By the terms thereof, he was in effect forbidden from visiting his child at defendant's home, and was prohibited from visiting him elsewhere unless he paid the costs of the proceedings and the sum of \$2 per month for the child's support. Neither of these things was done, so that it is clear plaintiff had no right to visit the child while at defendant's home. This is virtually conceded. But plaintiff insists that, when the child became sick and finally died, these facts so chang-

^{*} For discussion of principles, see Chapin on Torts, § 23.

⁴ A portion of the opinion is omitted.

ed the situation that, as a matter of law, he had an absolute right not only to visit the child while alive, but also to attend its funeral after death. We do not think that the sickness of the child had the effect of modifying the decrees from which we have quoted. They were either absolute in terms or so qualified that plaintiff had no rights thereunder until he performed the conditions imposed by the decrees. This he did not do.

Assuming that the death of the child so changed conditions as that the decrees were inapplicable, we then have the question, Had plaintiff either an absolute or qualified right to attend the funeral of his child which was being held from defendant's house? He, of course, obtained no right by reason of his former wife having taken up her domicile with her parents. They were as much strangers to each other as if they had never been married. True, the child was of his own blood, but by decree of court he had lost all right of custody or control of the child, and it was for the mother to say how the body should be controlled, where the funeral services were to be conducted, and where and how the child should be buried. By plaintiff's misconduct (as conclusively established by the decree) he had forfeited all rights to the custody and control of the child which he might otherwise have had. So that plaintiff had neither an absolute nor a qualified right to control the disposition of the body of the child or the funeral arrangements. But it is said that he had the right to attend the funeral which was being held at defendant's house; and that whether he tried or not, and conceding defendant's lawful right to say who should come upon his private premises for any purpose, even to attend a funeral, yet if he, defendant, although acting within his strict legal rights, maliciously denied plaintiff the right to enter the premises to see his child, or to attend the funeral services, an action will lie.

The questions thus presented are unique in character, and naturally there are no precedents which are directly in point.

At common law the duty of providing sepulture and of carrying to the grave the dead body decently covered was cast upon the person under whose roof the death took place; for such a person could not keep the body unburied nor do anything which prevented Christian burial. *Commonwealth v. Susquehanna Coal Co.*, 5 Kulp (Pa.) 195; *Scott v. Riley*, 40 Leg. Int. (Pa.) 382.

There was no duty, as we understand it, however, to conduct a public funeral, and, if there were, private funerals are so common in this country that we would not feel disposed to say that public services are required to be held. Defendant then was bound to provide sepulture and to carry the body to the grave; but he was not required to invite any one onto his premises simply to see the dead body or to have any sort of burial services for the public. It is fundamental of course that a man's dwelling house is "his castle," and that no one has the right to enter except upon invitation, express or implied. He may

exclude whom he will for good reason or for no reason, without liability for damages, and may defend his home against all intruders, even to the extent of taking life. *State v. Peacock*, 40 Ohio St. 333; *Pond v. People*, 8 Mich. 150; *State v. Scheele*, 57 Conn. 307, 18 Atl. 256, 14 Am. St. Rep. 106; *State v. Patterson*, 45 Vt. 308, 12 Am. Rep. 200.

There is no implied invitation to any one to attend a funeral conducted from a private dwelling unless it be announced that such funeral is public, and even if so announced the license or invitation may be revoked and any one denied the right to attend whose presence might be objectionable. It has even been held that the lord of the castle may so far exercise his authority as to say that his wife's relatives may not visit her, either in sickness or in health. *Rogers on Domestic Relations*, § 172. See, also, cases cited in 21 Cyc. at page 1147, among which is *Shaw v. Shaw*, 17 Conn. 189; *Commonwealth v. Wood*, 97 Mass. 225; *Lawrence v. Lawrence*, 3 Paige (N. Y.) 267.

The mother gave no intimation that she wished the father to see the child either while sick or after death, and defendant certainly had the legal right to exclude plaintiff from his premises at any time and under all circumstances. But it is said that, although defendant has this legal right, he could not exercise the same maliciously, and that if his act in excluding plaintiff was malicious action will lie. It is true that in some circumstances the doing of a perfectly lawful or legal act maliciously will give ground for an action; but we do not think this exceptional rule should apply here. As the control of one's own dwelling is absolute, the intent with which he excludes one therefrom is wholly immaterial.

The rule of the common law everywhere prevailing where that system is in force is that the doing of an act, lawful in itself, does not become actionable even though done maliciously; that is, in a vindictive way. *Heald v. Carney*, 11 C. B. 903, 73 E. C. L. 993; *Boyson v. Thorne*, 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233; *Kelly v. Railroad*, 93 Iowa, 452, 61 N. W. 957; *Bohn v. Hollis*, 54 Minn. 223, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319. The civil law, however, deems an act otherwise lawful in itself illegal if done with the malicious intent of injuring a neighbor; but this principle has not found place in our law save in very limited sense. *Chase-man v. Richards*, 7 H. L. Cases, 388.

Generally speaking "malicious motives make a bad act worse, but they cannot make that wrong which in its own essence is lawful." *Dawson v. Kemper*, 32 Ohio Law J. 15; *Jenkins v. Fowler*, 24 Pa. 308. See, also, notes to *Letts v. Kessler*, 40 L. R. A. 177. The case is not ruled by *Dunshee v. Standard Oil Co.*, 152 Iowa, 618, 132 N. W. 371, 36 L. R. A. (N. S.) 263, and other like cases cited in the opinion which have introduced some exceptions to the general rule and in effect applied the civil law to the peculiar facts there appearing. In most, if not all, of these cases, the defendant sought to promote some

pecuniary or beneficial interest either of his own or of some stranger, and the question was whether or not the purpose was sufficiently direct and proximate to justify the conduct. See, also, upon this subject, *Passaic Works v. Ely Dry Goods Co.*, 105 Fed. 163, 44 C. C. A. 426, 62 L. R. A. 673, and exhaustive note, and an article in 18 *Harvard Law Review* at page 411.

In the instant case, the defendant did no injury to the property of plaintiff, nor was he intending to secure any profit to himself as in the exceptional cases cited. Plaintiff had no right to attend the funeral, and defendant had the undoubted right to keep him off his premises. Having the right of selecting his guests or visitors, his malicious motive in excluding one does not give that one a right of recovery. This is the effect of our holding in *Rizer v. Tapper*, 133 Iowa, 628, 110 N. W. 1038.

There is no element of conspiracy in the case, and no ground for recovery is shown under any exceptional rules to which our attention has been called.

It follows that the trial court was right in directing the verdict, and the judgment entered thereon must be, and it is, affirmed.

LIABILITY UNDER LEGAL RULES GOVERNING CAUSE
AND EFFECTI. Proximate Cause in General¹

MILWAUKEE & ST. P. RY. CO. v. KELLOGG.

(Supreme Court of the United States, 1876. 94 U. S. 469, 24 L. Ed. 256.)

Error to the Circuit Court of the United States for the District of Iowa.

Mr. Justice STRONG² delivered the opinion of the court.

This was an action to recover compensation for the destruction by fire of the plaintiff's sawmill and a quantity of lumber, situated and lying in the state of Iowa, and on the banks of the river Mississippi. That the property was destroyed by fire was uncontroverted. From the bill of exceptions, it appears: That the "plaintiff alleged the fire was negligently communicated from the defendants' steamboat 'Jennie Brown' to an elevator built of pine lumber, and one hundred and twenty feet high, owned by the defendants, and standing on the bank of the river, and from the elevator to the plaintiff's sawmill and lumber piles, while an unusually strong wind was blowing from the elevator towards the mill and lumber. On the trial it was admitted that the defendants owned the steamboat and elevator; that the mill was five hundred and thirty-eight feet from the elevator, and that the nearest of the plaintiff's piles of lumber was three hundred and eighty-eight feet distant from it. * * *"

The verdict of the jury was: 1st, that the elevator was burned from the steamer "Jennie Brown"; 2d, that such burning was caused by not using ordinary care and prudence in landing at the elevator, under circumstances existing at that particular time; and, 3d, that the burning of the mill and lumber was the unavoidable consequence of the burning of the elevator.

The only reasonable construction of the verdict is, that the fault of the defendants—in other words, their want of ordinary care and prudence—consisted in landing the steamer at the elevator in the circumstances then existing, when a gale of wind was blowing towards it, when the elevator was so combustible and so tall. If this is not the meaning of the verdict, no act of negligence, of want of care, or of fault has been found. And this is one of the faults charged in the declaration. It averred that, while the wind was blowing a gale from the steamboat towards and in the direction of the elevator, the de-

¹ For discussion of principles, see Chapin on Torts, § 26.

² A portion of the opinion is omitted.

fendants carelessly and negligently allowed, permitted, and counseled (or, as stated in another count, "directed") the steamboat to approach and lie alongside of or in close proximity to the said elevator. This is something more than nonfeasance; it is positive action, the result, consequence, or outworking, as the jury have found it, of the want of such care as should have been exercised. * * *

The next exception is to the refusal of the court to instruct the jury as requested, that "if they believed the sparks from the 'Jennie Brown' set fire to the elevator through the negligence of the defendants, and the distance of the elevator from the nearest lumber pile was three hundred and eighty-eight feet, and from the mill five hundred and twenty-eight feet, then the proximate cause of the burning of the mill and lumber was the burning of the elevator, and the injury was too remote from the negligence to afford a ground for a recovery." This proposition the court declined to affirm, and in lieu thereof submitted to the jury to find whether the burning of the mill and lumber was the result naturally and reasonably to be expected from the burning of the elevator; whether it was a result which, under the circumstances, would naturally follow from the burning of the elevator; and whether it was the result of the continued effect of the sparks from the steamboat, without the aid of other causes not reasonably to be expected. All this is alleged to have been erroneous. The assignment presents the oft-embarrassing question, what is and what is not the proximate cause of an injury. The point propounded to the court assumed that it was a question of law in this case; and in its support the two cases of *Ryan v. New York Central Railroad Co.*, 35 N. Y. 210, 91 Am. Dec. 49, and *Pennsylvania Railroad Co. v. Kerr*, 62 Pa. 353, 1 Am. Rep. 431, are relied upon. Those cases have been the subject of much criticism since they were decided; and it may, perhaps, be doubted whether they have always been quite understood. If they were intended to assert the doctrine that when a building has been set on fire through the negligence of a party, and a second building has been fired from the first, it is a conclusion of law that the owner of the second has no recourse to the negligent wrongdoer, they have not been accepted as authority for such a doctrine, even in the states where the decisions were made. *Webb v. Rome, Watertown & Ogdensburg Railroad Co.*, 49 N. Y. 420, 10 Am. Rep. 389, and *Pennsylvania Railroad Co. v. Hope*, 80 Pa. 373, 21 Am. Rep. 100. And certainly they are in conflict with numerous other decided cases. *Kellogg v. Chicago & Northwestern Railroad Co.*, 26 Wis. 224, 7 Am. Rep. 69; *Perley v. Eastern Railroad Co.*, 98 Mass. 414, 96 Am. Dec. 645; *Higgins v. Dewey*, 107 Mass. 494, 9 Am. Rep. 63; *Fent v. Toledo, Peoria & Warsaw Railroad Co.*, 59 Ill. 349, 14 Am. Rep. 13.

The true rule is that what is the proximate cause of an injury is ordinarily a question for the jury. It is not a question of science or of legal knowledge. It is to be determined as a fact, in view of the

circumstances of fact attending it. The primary cause may be the proximate cause of a disaster, though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement, or as in the oft-cited case of the squib thrown in the market place. 2 Bl. Rep. 892. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events, so linked together as to make a natural whole, or was there some new and independent cause intervening between the wrong and the injury? It is admitted that the rule is difficult of application. But it is generally held that, in order to warrant a finding that negligence, or an act not amounting to wanton wrong, is the proximate cause of an injury, it must appear that the injury was the natural and probable consequence of the negligence or wrongful act, and that it ought to have been foreseen in the light of the attending circumstances. These circumstances, in a case like the present, are the strength and direction of the wind, the combustible character of the elevator, its great height, and the proximity and combustible nature of the sawmill and the piles of lumber.

Most of these circumstances were ignored in the request for instruction to the jury. Yet it is obvious that the immediate and inseparable consequence of negligently firing the elevator would have been very different if the wind had been less, if the elevator had been a low building constructed of stone, if the season had been wet, or if the lumber and the mill had been less combustible. And the defendants might well have anticipated or regarded the probable consequences of their negligence as much more far-reaching than would have been natural or probable in other circumstances. We do not say that even the natural and probable consequences of a wrongful act or omission are in all cases to be chargeable to the misfeasance or nonfeasance. They are not when there is a sufficient and independent cause operating between the wrong and the injury. In such a case the resort of the sufferer must be to the originator of the intermediate cause. But when there is no intermediate efficient cause, the original wrong must be considered as reaching to the effect, and proximate to it. The inquiry must, therefore, always be whether there was any intermediate cause disconnected from the primary fault, and self-operating, which produced the injury. Here lies the difficulty. But the inquiry must be answered in accordance with common understanding. In a succession of dependent events an interval may always be seen by an acute mind between a cause and its effect, though it may be so imperceptible as to be overlooked by a common mind. Thus, if a building be set on fire by negligence, and an adjoining building be destroyed

without any negligence of the occupants of the first, no one would doubt that the destruction of the second was due to the negligence that caused the burning of the first. Yet in truth, in a very legitimate sense, the immediate cause of the burning of the second was the burning of the first. The same might be said of the burning of the furniture in the first. Such refinements are too minute for rules of social conduct. In the nature of things, there is in every transaction a succession of events, more or less dependent upon those preceding, and it is the province of a jury to look at this succession of events or facts, and ascertain whether they are naturally and probably connected with each other by a continuous sequence, or are dis severed by new and independent agencies, and this must be determined in view of the circumstances existing at the time.

If we are not mistaken in these opinions, the Circuit Court was correct in refusing to affirm the defendants' proposition, and in submitting to the jury to find whether the burning of the mill and lumber was a result naturally and reasonably to be expected from the burning of the elevator, under the circumstances, and whether it was the result of the continued influence or effect of the sparks from the boat, without the aid or concurrence of other causes not reasonably to have been expected. The jury found, in substance, that the burning of the mill and lumber was caused by the negligent burning of the elevator, and that it was the unavoidable consequence of that burning. This, in effect, was finding that there was no intervening and independent cause between the negligent conduct of the defendants and the injury to the plaintiff. The judgment must, therefore, be affirmed. Judgment affirmed.

II. Intervention of Natural Force³

BISHOP v. ST. PAUL CITY RY. CO.

(Supreme Court of Minnesota, 1892. 48 Minn. 26, 50 N. W. 927.)

DICKINSON, J.⁴ * * * The case presents the question as to whether the plaintiff's grave infirmities, which became manifest some time after the accident, were a result of the accident. The plaintiff was standing in the rear car or coach, supporting himself by holding on straps suspending from the upper part of the car for that purpose. When the car was thrown on its side, as it reached the curve in its rapid descent, he was thrown down, the impulse being such as to break his hold on the supporting straps. He immediately became unconscious, but regained consciousness in a few moments, and did not then seem to have been very seriously injured. On the right side of his head, above the ear, were a few cuts, apparently not very harmful, and a small contusion, the marks of which disappeared within a few days. He went about his business the same day, and continued to do so thereafter for a considerable period of time. But while, according to the proof, he had always before the accident been in good health, and had never suffered the ills or exhibited the symptoms which followed it, the evidence goes to show that from that time on a marked change became manifest in his physical and mental condition. He became nervous and irritable; was troubled with inability to sleep; suffered a dull, heavy pain in the back of the head, extending sometimes further down the back. There was a feeling of pressure within the head, as though it would burst. When sleeping, the scene of the accident was repeatedly pictured to his mind in dreams. His mental functions were affected, his mind being "muddled" as he expresses it. These conditions did not pass away, but became more aggravated, and on the 5th of September, some seven months after the accident, without other apparent cause than the circumstances here referred to, paralysis supervened, involving the whole left side. The paralytic condition still continues, and, according to the opinions of competent expert witnesses, will always exist. The plaintiff was 50 years of age. While upon this appeal the facts must, without doubt, be taken to be as above indicated, the question was closely contested as to whether the paralysis, caused immediately by the rupture of a blood vessel in the brain, is a result of the accident and the shock and injury then received. A careful examination of the voluminous evidence bearing upon this point shows that the verdict in favor of the plaintiff is certainly justified. The

³ For discussion of principles, see Chapin on Torts, § 27.

⁴ A portion of the opinion is omitted.

proof was chiefly the testimony of numerous competent medical experts. The examination of these witnesses on both sides was conducted with marked intelligence, skill, and thoroughness; and while these witnesses, whose competency to testify on the subject is beyond question, do not agree in their opinions, it seems apparent that the jury were as well informed as they could be, from the nature of the case, to form a correct conclusion. It is needless to here enter into any extended statement of the pathology of the case, as given by these witnesses, or to contrast the views and reasons given for their opinions. There is little or no controversy over the fact that the rupture of the blood vessel causing the paralysis is to be ascribed to a degeneration or impaired condition of the blood vessel, the process of which degeneration might have extended over a considerable period of time before the occurrence of the rupture. But whether such degeneration or impairment of health of the blood vessels was or could have been caused by the accident and injury then received the experts disagree. Upon this point we will only say that the opinion of several competent witnesses is that it was so caused, and it may be added that one of the explanations given for such an opinion is that the physical concussion (which produced temporary unconsciousness) and the mental shock affected and impaired the nutrition of the nerve cells of the brain which preside over and control the circulation of blood in that organ, so that the blood vessels became distended from an excessive flow of blood, and gradually degenerated, and became weakened, until they were incapable of resisting the pressure. In support of the opinions of experts in favor of the plaintiff's side of this issue are to be considered also the facts, which the evidence tended to show, of the health of the plaintiff up to the time of the accident; that the ills which he suffered from that time on indicated an excess or unnatural pressure of blood in the brain; and that an examination of the plaintiff disclosed no disease or functional derangement of other organs to which the paralysis might be attributed. * * *

The instruction referred to in the ninth assignment of error was not, as applied to the case before the jury, erroneous. The injury received at the time of the accident was the proximate cause of the paralysis, if it caused the disease in the course of which and as a result of which the paralysis followed. * * *

III. Fright and Mental Anguish⁵

MITCHELL v. ROCHESTER RY. CO.

(Court of Appeals of New York, 1896. 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604.)

MARTIN, J. The facts in this case are few and may be briefly stated. On the 1st day of April, 1891, the plaintiff was standing upon a cross-walk on Main street in the city of Rochester, awaiting an opportunity to board one of the defendant's cars which had stopped upon the street at that place. While standing there and just as she was about to step upon the car, a horse car of the defendant came down the street. As the team attached to the car drew near, it turned to the right and came so close to the plaintiff that she stood between the horses' heads when they were stopped.

She testified that from fright and excitement caused by the approach and proximity of the team she became unconscious and also that the result was a miscarriage and consequent illness. Medical testimony was given to the effect that the mental shock which she then received was sufficient to produce the result.

Assuming that the evidence tended to show that the defendant's servant was negligent in the management of the car and horses, and that the plaintiff was free from contributory negligence, the single question presented is whether the plaintiff is entitled to recover from the defendant's negligence which occasioned her fright and alarm and resulted in the injuries already mentioned. While the authorities are not harmonious upon the question, we think the most reliable and better considered cases, as well as public policy, fully justify us in holding that the plaintiff cannot recover for injuries occasioned by fright, as there was no immediate personal injury. *Lehman v. Brooklyn City R. R. Co.*, 47 Hun, 355; *Victorian Railways Commissioners v. Coultas* L. R., 13 Appeal Cases, 222; *Ewing v. P., C. & St. L. Ry. Co.*, 147 Pa. 40, 23 Atl. 340, 14 L. R. A. 666, 30 Am. St. Rep. 709. The learned counsel for the respondent in his brief very properly stated that "the consensus of opinion would seem to be that no recovery can be had for mere fright," as will be readily seen by an examination of the following additional authorities: *Haile v. Texas & Pacific R. Co.*, 60 Fed. 557, 9 C. C. A. 134, 23 L. R. A. 774; *Joch v. Dankwardt*, 85 Ill. 331; *Canning v. Inhabitants of Williamstown*, 1 Cush. (Mass.) 451; *Western Union Tel. Co. v. Wood*, 57 Fed. 471, 6 C. C. A. 432, 21 L. R. A. 706; *Renner v. Canfield*, 36 Minn. 90, 30 N. W. 435, 1 Am. St. Rep. 654; *Allsop v. Allsop*, 5 Hurl. & Nor. (N. S.) 534; *Johnson v. Wells*

⁵ For discussion of principles, see Chapin on Torts, § 28.

Fargo & Co., 6 Nev. 224, 3 Am. Rep. 245; Wyman v. Leavitt, 71 Me. 227, 36 Am. Rep. 303.

If it be admitted that no recovery can be had for fright occasioned by the negligence of another, it is somewhat difficult to understand how a defendant would be liable for its consequences. Assuming that fright cannot form the basis of an action, it is obvious that no recovery can be had for injuries resulting therefrom. That the result may be nervous disease, blindness, insanity, or even a miscarriage no way changes the principle. These results merely show the degree of fright or the extent of the damages. The right of action must still depend upon the question whether a recovery may be had for fright. If it can, then an action may be maintained, however slight the injury. If not, then there can be no recovery, no matter how grave or serious the consequences. Therefore the logical result of the respondent's concession would seem to be, not only that no recovery can be had for mere fright, but also that none can be had for injuries which are the direct consequences of it.

If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigation in cases where the injury complained of may be easily feigned without detection and where the damages must rest upon mere conjecture or speculation. The difficulty which often exists in cases of alleged physical injury, in determining whether they exist, and if so, whether they were caused by the negligent act of the defendant would not only be greatly increased, but a wide field would be opened for fictitious or speculative claims. To establish such a doctrine would be contrary to principles of public policy.

Moreover, it cannot be properly said that the plaintiff's miscarriage was the proximate result of the defendant's negligence. Proximate damages are such as are the ordinary and natural results of the negligence charged and those that are usual and may, therefore, be expected. It is quite obvious that the plaintiff's injuries do not fall within the rule as to proximate damages. The injuries to the plaintiff were plainly the result of an accidental or unusual combination of circumstances which could not have been reasonably anticipated, and over which the defendant had no control, and hence her damages were too remote to justify a recovery in this action.

These considerations lead to the conclusion that no recovery can be had for injuries sustained by fright occasioned by the negligence of another, where there is no immediate personal injury.

The orders of the General and Special Terms should be reversed and the order of the Trial Term granting a nonsuit affirmed with costs.

All concur, except HAIGHT, J., not sitting and VANN, J., not voting. Ordered accordingly.

HICKEY v. WELCH.

(St. Louis Court of Appeals, Missouri, 1901. 91 Mo. App. 4.)

Plaintiff and her family occupied as their home a house belonging to Elizabeth Welch, wife of appellant. The premises adjoined defendant's residence. It was alleged that defendant broke down the fence, entered plaintiff's back yard, dug a ditch and threw up a bank of earth around the water-closet used by plaintiff's family to a height of five feet, making it dangerous and nearly impossible for plaintiff and her children to enter the closet. While doing so he grossly abused plaintiff and her husband, applied vituperative and insulting language and epithets to them, pointed a pistol at plaintiff and threatened to shoot her and afterwards menaced her with a shotgun. Plaintiff had formerly suffered from severe neurasthenia or nervous exhaustion, but a few months before she had entirely recovered. The acts of defendant were charged to have so terrified, shocked and humiliated her as to bring on a recurrence of the disease in a more violent form greatly impairing her health, causing her to suffer from numbness in her limbs, loss of memory, inability to concentrate her thoughts, constant pains, spasmodic jerkings and twitchings of the muscles, a recurrent vision of defendant pointing a gun at her, dread of insanity and other symptoms indicative of a profoundly disordered system.

Defendant asked an instruction in the nature of a demurrer to the evidence at the close of plaintiff's evidence. The court refused and submitted the issue to the jury. A verdict was returned in plaintiff's favor for \$200 actual and \$300 punitive damages.

GOODE, J.⁶ It is claimed respondent was not physically injured by appellant and therefore her case must fail. There are several good answers to this contention.

Some courts have gone so far in applying the rule that damages are not recoverable for mental anguish or fright as to practically hold that, no injury, however serious, to a person's health as the result of a negligent tort, even though insanity, epilepsy or some other fearful disease ensues, is actionable, if the tort produced terror, or anxiety; it being assumed, apparently that these mental phenomena, instead of the wrongful act, were the cause of the subsequent malady. Mere alarm or distress of mind, is not, and ought not to be, a cause of action in itself. *Trigg v. Railway Co.*, 74 Mo. 147, 41 Am. Rep. 305; *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575. Such emotions shortly pass off and the patient is as well as ever. They are easily feigned and often arise from trivial or imaginary danger, and to make them actionable would, as has often been said, open the door to fraudulent demands and encourage litigation over fanciful and fictitious wrongs, when no real harm was done. Besides, there is no criterion by which to estimate the damages for mental

⁶ The statement of facts is abridged and a portion of the opinion is omitted.

disquietude, and if damages were allowed therefor, they would necessarily be conjectural and speculative. Pleasant emotions are not among the rights which the law safeguards—property, health, reputation, personal liberty and security. But when a nervous disorder, acute or chronic, or an illness such as reputable physicians recognize as a genuine disease and can trace with reasonable certainty to its true cause, follows an unlawful act, no sound reason can be given why the party injured should not be compensated in damages, although there was no visible hurt at the time. Why should the fact that the sufferer was frightened cut him off from redress. Fright is itself a result of an agitation or shock to the nervous system, and when this shock is severe enough, it produces more than fright, namely an impairment of health in some form or other, and more or less serious. All emotions are due to minute physical changes in the nervous system and when the change resulting from the shock is extensive, it sometimes induces disease. The suffering thus occasioned is as much due to physical injury as that which results from an open wound on the surface of the body. If human bodies were composed only of bones, muscles and viscera, or if suffering could only be caused by injuring those parts, the theory of this legal doctrine would be accurate; but it is matter of common knowledge that a person may be physically whole and uninjured, to all appearances, and still be a great sufferer from nervous afflictions. A physical injury is at the basis of this class of disorders as of all others, but is too obscure to be readily observed. False pathology and physiology seem to have led to applications of the rule in question which were extremely unjust. The ancient superstition which found the proximate cause of mental and nervous diseases in diabolical possession was scarcely more ridiculous than the theory that when an ailment of that kind follows a great fright, due to another's tortious act, the fright and not the tort is the proximate cause of the injury. Such diseases, like all others, have their origin in a physical lesion, not a metaphysical state. It was justly remarked by a learned jurist in a case of this kind: "As the relation between fright and injury to the nerves or brain structure of the body is a matter which depends entirely upon scientific or medical testimony, it is impossible for any court to lay down as a matter of law that, if negligence caused the fright and such fright in its turn so affected such structure as to cause injury to health, such injury cannot be a consequence which by ordinary course of thought would flow from the negligence, unless such injury accompanied such negligence in point of time." *Bell v. Great Northern Railway*, L. R. 26 Ir. Exch. Div. 428.

It was said in *Sloane v. Railway Co.*, 111 Cal. 668, 44 Pac. 320, 32 L. R. A. 193: "It is a matter of general knowledge that an attack of sudden fright on an exposure to imminent peril has produced in individuals a complete change in their nervous system and rendered one who was physically strong and vigorous, weak and timid; such a re-

sult must be regarded as an injury to the body rather than the mind, even though the mind be at the same time injuriously affected."

The cases which go to the length of holding that no recovery can be had for suffering following fright or injury occasioned by a tort do not agree in the reason for the rule. Some put it on the ground that it would multiply litigation too much to make such injuries actionable; others on the ground that the damages are too remote and speculative; and still others on the ground that, because the agitated mental state of the injured person came between the wrongful act and the alleged injury, the act was not the proximate cause and such results could not have been expected to flow from it. *Mitchell v. Railway Co.*, 151 N. Y. 107, 45 N. E. 354, 34 L. R. A. 781, 56 Am. St. Rep. 604; *International Tel. Co. v. Saunders*, 32 Fla. 434, 14 South. 148, 21 L. R. A. 810; *Mentzler v. Telegraph Co.*, 93 Iowa, 752, 62 N. W. 1, 28 L. R. A. 72, 57 Am. St. Rep. 294. The case of *Mitchell v. Railway Co.*, is remarkable in that a recovery was denied for a miscarriage, and the suffering incident thereto, which followed a great fright caused by the defendant's tort. The opposite conclusion was reached, on more logical grounds we think, in *Oliver v. Town of La Valle*, 36 Wis. 592; *Railway Co. v. Hunerberg*, 16 Ill. App. 387.

Regarding the first of the above reasons, it may be said that if the injury complained of is one which falls in the category of well-known diseases, whose symptoms physicians are familiar with, there is no more chance for imposition than in the case of other injuries, and hence no reason to apprehend a flood of meretricious litigation; if the litigation is meritorious it is the duty of courts to entertain it.

Neither would the damages be more conjectural than where they are allowed for prospective injury and suffering; and damages for future injury may always be recovered if shown to be reasonably certain to occur.

The answer to the other objection is that, when such an injury follows a tort and is proved by competent testimony to have resulted from it, the tort is the proximate cause, according to the accepted meaning of the phrase. An act is a proximate cause of an injury in a legal sense, when the injury was the natural and probable consequence of the act in the light of attending circumstances. Nor is it necessary that the harmful result should immediately follow the tort, provided it is traceable directly to it without any other cause intervening. "The primary cause may be the proximate cause of a disaster though it may operate through successive instruments, as an article at the end of a chain may be moved by a force applied to the other end, that force being the proximate cause of the movement; or as in the oft-cited case of the squib thrown into the market place. The question always is, Was there an unbroken connection between the wrongful act and the injury, a continuous operation? Did the facts constitute a continuous succession of events so linked together as to make a natural whole, or was there some new and independent cause intervening between

the wrong and the injury?" *Milwaukee, etc., Railway Co. v. Kellogg*, 94 U. S. 469, 24 L. Ed. 256. And to defeat recovery on the ground of an intervening cause, it was ruled: "The new, independent, intervening cause must be one not produced by the wrongful act or omission, but independent of it and adequate to bring the injurious result. Whether the natural connection of events was maintained or was broken by such new, independent cause is generally a question for the jury." *Mack v. Railway Co.*, 52 S. C. 323, 29 S. E. 905, 40 L. R. A. 679, 68 Am. St. Rep. 913. A plaintiff may obtain damages for concussion following a jar. "Railway spine" is a frequent ground of recovery. If such a result is actionable when it develops later from a shock, why refuse relief when the shock is received through the mind? Through the sense of sight or hearing instead of touch? In truth, the courts which deny relief for injuries following fright are so impressed with the injustice of the rule that they seize on any pretext to allow a recovery—even the most frivolous legal wrong and however slight the immediate harm may be. *City Transfer Co. v. Robinson*, 12 Ky. Law Rep. 555; *Larson v. Chase*, 47 Minn. 307, 50 N. W. 238, 14 L. R. A. 85, 28 Am. St. Rep. 370; *Meagher v. Driscoll*, 99 Mass. 281, 96 Am. Dec. 759.

In this case there was abundant expert testimony to prove plaintiff's nervousness, or rather specific nervous disease, was due, with reasonable certainty, to the shock she received from defendant's conduct. That disease was unquestionably a physical injury, and we do not think she ought to be denied redress for it and the suffering of mind which went with it merely because she was paralyzed with terror at the time defendant abused and threatened her. If she had had mental anguish and nothing more, the case would be different. We think there is nothing inconsistent in this view with what was decided by our Supreme Court in *Trigg v. Railway Co.* or *Connell v. Telegraph Co.*, *supra*.

But nearly all the cases in which the rule was applied that no recovery is permissible for mental anguish, fright or their sequelæ were where the tort alleged was negligence. The decisions usually state that if the act was willful, malicious or accompanied by circumstances of inhumanity and oppression, an action lies for mental anguish, whether physical harm was done or not. A precedent exactly deciding this proposition is not at hand; but it is assumed to be the law in the textbooks and in most of the cases which exonerate the defendant where negligence is the basis of the action.

In *Trigg v. Railway Co.*, 74 Mo. 147, 41 Am. Rep. 305, where the plaintiff sought to recover for anxiety on account of being carried by the defendant past her destination, it was said there were no circumstances of aggravation, "such as malice, insult, wantonness, violence, oppression or inhumanity." That remark, however, was made in connection with the claim for punitive damages.

So in *Deming v. Railway Co.*, 80 Mo. App. 153, it was said: "The general rule is that mental anguish, when connected with bodily injury,

is the subject of damages, but it must be so connected in order to be included in the estimate of damages, unless the injury is accompanied by circumstances of malice, insult or inhumanity." Many of these cases are by passengers against railroad companies for being carried past their destination, as in the *Trigg Case*, or against telegraph companies by persons to whom messages were sent, for anxiety caused by failure to deliver the message promptly, such as *Connell v. Telegraph Co.*, 116 Mo. 34, 22 S. W. 345, 20 L. R. A. 172, 38 Am. St. Rep. 575.

The Supreme Court of Massachusetts, in applying the rule, was careful to limit it to negligence cases, saying: "It is hardly necessary to add that this decision does not reach those classes of action where an intention to cause mental distress or to hurt the feelings is shown, or is reasonably to be inferred, as, for example, in cases of seduction, slander, malicious prosecution or arrest and some others. Nor do we include cases of acts of gross carelessness or recklessness, showing utter indifference to such consequences, when they must have been in the actor's mind." *Spade v. Railway Co.*, 168 Mass. 285, 47 N. E. 88, 38 L. R. A. 512, 60 Am. St. Rep. 393.

We have no doubt that where the act charged was willfully, wantonly or maliciously done, and especially where its obvious purpose was to wound, humiliate or oppress another, substantial damages may be given for the mental suffering it entailed. *West v. Forrest*, 22 Mo. 344. Assuming the testimony for the plaintiff in the present case to be true, it is emphatically one of that kind, the defendant's behavior having been atrocious.

Moreover, the evidence tends to show the defendant's entrance and acts on plaintiff's premises constituted a forcible trespass, for which she is entitled to compensation; and her anguish on account of his violent and abusive conduct may be taken into account in connection with the trespass in aggravation of the damages. *Larson v. Chase*, supra; *Meagher v. Driscoll*, supra; *Moyer v. Gordon*, 113 Ind. 282, 14 N. E. 476.

Further, there was proof an assault was committed by defendant on plaintiff. "An assault is an inchoate battery. The wrong is putting a person in present fear of violence, so that any act fitted to have that effect on a reasonable man is an assault." *Webb's Pollock on Torts*, 251. Witnesses swore defendant pointed a pistol at plaintiff and threatened to shoot her, and likewise raised a shotgun in a menacing way. Those acts were an assault. *Wharton's Criminal Law* (10th Ed.) 1606; *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373; *State v. Dooley*, 121 Mo. 591, 26 S. W. 558. An action lies for such a disturbance of one's peace; and the resulting anxiety, fright, and other injuries, mental or physical, may be considered in estimating the actual, not merely the punitive damages, as they say in any case where a personal injury is inflicted. *Beach v. Hancock*, 27 N. H. 223, 59 Am. Dec. 373; *Barbee v. Reese*, 60 Miss. 906; *Canning v. Williamstown*, 55 Mass. (1 Cush.) 451; *Smith v. Railway Co.*, 23 Ohio St. 10; *City*

Transfer Co. v. Robinson, 12 Ky. Law Rep. 555; Hewlett v. George, 68 Miss. 703, 9 South. 885, 13 L. R. A. 682; Shepard v. Railway Co., 77 Iowa, 54, 41 N. W. 564; Curtis v. Railway Co., 87 Iowa, 622, 54 N. W. 339; Railway Co. v. Flagg, 43 Ill. 364. * * *

The foregoing considerations lead to an affirmance of the judgment, in which all concur.

IV. Intervention of Voluntary Act[†]

ALEXANDER v. TOWN OF NEW CASTLE.

(Supreme Court of Indiana, 1888. 115 Ind. 51, 17 N. E. 200.)

This action was brought by Alexander to recover for personal injuries sustained by him through the alleged negligence of the defendant. The complaint charged that the town allowed an excavation to be made in the side of one of the streets, and negligently suffered this excavation to remain open and uninclosed, whereby the plaintiff, without fault on his part, fell into this excavation and was injured. The town answered: First, in denial; secondly, that the plaintiff had a warrant for the arrest of one Heavenridge, and as special constable was taking Heavenridge to jail, under an order from a justice of the peace, and in doing so attempted to pass the excavation in question, that when opposite the same Heavenridge seized the plaintiff and threw him into the excavation, whereby he was injured as charged in the complaint, and Heavenridge was enabled to escape.

A demurrer to this answer, on the ground of insufficiency of facts to constitute a defense, was overruled.

NIBLACK, C. J. (after stating the facts).⁸ Complaint is first made of the overruling the demurrer to the second paragraph of the answer, and this complaint is based upon the claim that, as the pit or excavation so wrongfully and negligently permitted to remain open and uninclosed afforded Heavenridge the opportunity of throwing the plaintiff into it as a means of escape, it was, in legal contemplation, the proximate cause of the injuries which the plaintiff received.

However negligent a person, or a corporation, may have been in some particular respect, he, or it, is only liable to those who may have been injured by reason of such negligence, and the negligence must have been the proximate cause of the injury sued for.

Where some independent agency has intervened and been the immediate cause of the injury, the party guilty of negligence in the first instance is not responsible. On that subject Wharton, in his work on

[†] For discussion of principles, see Chapin on Torts, § 20.

⁸ Portions of the opinion are omitted.

the Law of Negligence, at section 134, says: "Supposing that if it had not been for the intervention of a responsible third party the defendant's negligence would have produced no damage to the plaintiff, is the defendant liable to the plaintiff? This question must be answered in the negative, for the general reason that causal connection between negligence and damage is broken by the interposition of independent responsible human action. I am negligent on a particular subject-matter as to which I am not contractually bound. Another person, moving independently, comes in, and either negligently or maliciously so acts as to make my negligence injurious to a third person. If so, the person so intervening acts as a nonconductor, and insulates my negligence, so that I cannot be sued for the mischief which the person so intervening directly produces. He is the one who is liable to the person injured. I may be liable to him for my negligence in getting him into difficulty, but I am not liable to others for the negligence which he alone was the cause of making operative."

So, if a house has been negligently set on fire, and the fire has spread beyond its natural limits by means of a new agency, for example, if a high wind arose after its ignition, and carried burning brands to a great distance, thus causing a fire and a loss of property at a place which would have been safe but for the wind, the loss so caused by the wind will be set down as a remote consequence, for which the person setting the fire should not be held responsible. 1 Thompson, Negligence, 144. * * *

Heavenridge was clearly an intervening, as well as an independent, human agency in the infliction of the injuries of which the plaintiff complained. The circuit court, consequently, did not err in overruling the demurrer to the second paragraph of the answer. * * *

Judgment [for the defendant] affirmed.

1. FORESEEABLE INTERVENTION *

LANE v. ATLANTIC WORKS.

(Supreme Judicial Court of Massachusetts, 1872. 111 Mass. 136.)

Tort. The declaration was as follows: "And the plaintiff says that the defendants carelessly left a truck, loaded with iron, in Marion street, a public highway in Boston, for the space of twenty minutes and more; and the iron on said truck was so carelessly and negligently placed that it would easily fall off; and that the plaintiff was walking in said highway, and was lawfully in said highway, and lawfully using said highway, and in the exercise of due care; and said

* For discussion of principles, see Chapin on Torts, § 29.

iron upon said truck was thrown and fell therefrom upon the plaintiff in consequence of the defendants' carelessness, and the plaintiff was severely bruised and crippled," etc.

The plaintiff introduced evidence,¹⁰ that the defendants left a truck with a bar of iron on it standing in front of their works on Marion street, which was a public highway in Boston; that the iron was not fastened, but would easily roll off the truck; that the plaintiff, then 7 years old, and a boy about the same age named James Conners, were walking, between six and seven in the evening on the side of Marion street opposite the truck and the defendants' works; that Horace Lane, a boy 12 years old, being near the truck, called to them to come over and see him move it; that the plaintiff and Conners said they would go over and watch him do it; that they went over accordingly; that the plaintiff stood near the truck to see the wheels move, as Horace Lane took hold of the tongue of the truck; that Horace Lane moved the tongue somewhat; that the iron rolled off and injured the plaintiff's leg; and that neither the plaintiff nor Conners touched the iron or truck at all.

The defendants introduced evidence tending to show that the iron was fastened securely on the truck, which was drawn from the defendants' works into the street at four o'clock in the afternoon; that the boys removed the fastenings; that Horace Lane placed the boys one on each side of the truck; that he turned the tongue of the truck round; that he and Conners then took hold of the iron and rolled it off; that the plaintiff had his hands on the iron or on the truck when the iron rolled off on him; and that the boys were engaged in the common enterprise of rolling off the iron and moving the truck. There was no evidence that Horace Lane had any lawful purpose or object in moving the truck, or any right to meddle with it.

The defendants requested the judge to give, besides other rulings, the following:

"2. In order to make the plaintiff a participator or joint actor with Horace Lane, in his conduct in meddling with the truck for an unlawful purpose, it was not necessary for him to have actually taken hold of the tongue, or the iron, or the truck, to help or aid in moving it. It is enough if he joined with him in a common object and purpose voluntarily, went across the street on his invitation for that avowed purpose, and stood by the truck to encourage and aid, by his presence, word or act, the accomplishment of the purpose.

"3. While it is true that negligence alone on the part of Horace Lane, which contributed to the injury combining with the defendants' negligence, would not prevent a recovery, unless the plaintiff's negligence also concurred as one of the contributory causes also, yet, if the fault of Horace Lane was not negligence, but a voluntary meddling with the truck or iron, for an unlawful purpose, and wholly as a

¹⁰ The statement of facts is abridged and part of the opinion is omitted.

sheer trespass, and this culpable conduct was the direct cause of the injury, which would not have happened otherwise, the plaintiff cannot recover."

The judge did not give the ruling requested, but gave rulings, which, so far as they are now material, were as follows:

"The city ordinance is proper to be put in evidence and to be considered by the jury upon the question of negligence, although it is not conclusive proof that the defendants were in point of fact negligent in the act of leaving the truck there. It is a matter of evidence, to be weighed with all the other evidence in the case.

"If the sole or the direct cause of the accident was the act of Horace Lane, the defendants are not responsible. If he was the culpable cause of the accident, that is to say, if the accident resulted from the fault of Horace Lane, they are not responsible. But if Horace Lane merely contributed to the accident, and if the accident resulted from the joint negligence of Horace Lane in his conduct in regard to moving the truck and the negligence of the defendants in leaving it there, where it was thus exposed, or leaving it so insecurely fastened that this particular danger might be reasonably apprehended therefrom, then the intermediate act of Horace Lane will not prevent the plaintiff from recovering, provided he himself was in the exercise of due and reasonable care. If the plaintiff himself participated in the act of Horace Lane no further than to go there and be a witness to this transaction which Horace Lane proposed to perform, crossing over the street by his invitation, and witnessing him move this truck, that would not make him such a participator in the wrongful act of Horace Lane as to prevent his recovery, provided he himself was in the exercise of reasonable care.

"If, however, he was actually engaged in the wrongful act of Horace Lane, if he was actually engaged in disturbing this truck, and moving the fastenings which had been put upon it in order to prevent it from being disturbed, and was actively participating in the act of Horace Lane, then he cannot recover. But if the act of the plaintiff was limited to crossing the street for the purpose of witnessing the act done by Horace Lane, in answer to his invitation, and no active participation was taken by the plaintiff other than that, it would not prevent his recovery, provided he himself was in the exercise of due and reasonable care."

At the close of his charge to the jury the judge read the second ruling prayed for by the defendants, and said:

"If the plaintiff took an active participation in it, as I before instructed you, or went there as a joint actor, for the purpose of encouraging Horace Lane in it, he cannot recover. If he went there attracted by curiosity only, at the invitation of the party who was about to move the truck, Horace Lane, then he may recover; provided you are further satisfied that, in what he did, he was in the exercise of

the due and reasonable care that should be expected of a person of his age."

The jury returned a verdict for the plaintiff for \$6,000, and the defendants alleged exceptions.

COLT, J. In actions of this description, the defendant is liable for the natural and probable consequences of his negligent act or omission. The injury must be the direct result of the misconduct charged; but it will not be considered too remote if, according to the usual experience of mankind, the result ought to have been apprehended.

The act of a third person, intervening and contributing a condition necessary to the injurious effect of the original negligence, will not excuse the first wrongdoer, if such act ought to have been foreseen. The original negligence still remains a culpable and direct cause of the injury. The test is to be found in the probable injurious consequences which were to be anticipated, not in the number of subsequent events and agencies which might arise.

Whether in any given case the act charged was negligent, and whether the injury suffered was, within the relation of cause and effect, legally attributable to it, are questions for the jury. They present oftentimes difficult questions of fact, requiring practical knowledge and experience for their settlement, and where there is evidence to justify the verdict it cannot be set aside as matter of law. The only question for the court is, whether the instructions given upon these points stated the true tests of liability. * * *

3. The last instruction asked was rightly refused. Under the law as laid down by the court the jury must have found the defendants guilty of negligence in doing that from which injury might reasonably have been expected, and from which injury resulted; that the plaintiff was in the exercise of due care; that Horace Lane's act was not the sole, direct, or culpable cause of the injury; that he did not purposely roll the iron upon the plaintiff; and that the plaintiff was not a joint actor with him in the transaction, but only a spectator. This supports the verdict. It is immaterial whether the act of Horace Lane was mere negligence or a voluntary intermeddling. It was an act which the jury have found the defendants ought to have apprehended and provided against. *McDonald v. Snelling*, 14 Allen, 290, 295, 92 Am. Dec. 768; *Powell v. Deveney*, 3 Cush. 300, 50 Am. Dec. 738; *Barnes v. Chapin*, 4 Allen, 444, 81 Am. Dec. 710; *Tutein v. Hurley*, 98 Mass. 211, 93 Am. Dec. 154; *Dixon v. Bell*, 5 M. & S. 198; *Mangan v. Atterton*, L. R. 1 Ex. 239; *Illidge v. Goodwin*, 5 C. & P. 190; *Burrows v. March Gas Co.*, L. R. 5 Ex. 67, 71; *Hughes v. Macfie*, 2 H. & C. 744.

Exceptions overruled.

2. INVOLUNTARY INTERVENTION¹¹

ECKERT v. LONG ISLAND R. CO.

(Court of Appeals of New York, 1871. 43 N. Y. 502, 3 Am. Rep. 721.)

Action in the City Court of Brooklyn, by the plaintiff as administratrix of her husband, Henry Eckert, deceased, to recover damages for the death of the intestate, caused as alleged by the negligence of the defendant, its servants and agents, in the conduct and running of a train of cars over its road. The case, as made by the plaintiff, was that the deceased received an injury from a locomotive engine of the defendant, which resulted in his death, on the 26th day of November, 1867, under the following circumstances:

He was standing in the afternoon of the day named, in conversation with another person about fifty feet from the defendant's track in East New York, as a train of cars was coming in from Jamaica at a rate of speed estimated by the plaintiff's witnesses of from twelve to twenty miles an hour. The plaintiff's witnesses heard no signal either from the whistle or the bell upon the engine. The engine was constructed to run either way without turning and it was then running backward with the cowcatcher next the train it was drawing, and nothing in front to remove obstacles from the track. The claim of the plaintiff was that the evidence authorized the jury to find that the speed of the train was improper and negligent in that particular place, it being a thickly populated neighborhood and one of the stations of the road.

The evidence on the part of the plaintiff also showed that a child three or four years old was sitting or standing upon the track of the defendant's road as the train of cars approached and was liable to be run over, if not removed; and the deceased, seeing the danger of the child, ran to it, and, seizing it, threw it clear of the track on the side opposite to that from which he came, but, continuing across the track himself, was struck by the step or some part of the locomotive or tender, thrown down, and received injuries from which he died the same night.

The evidence on the part of the defendant tended to prove that the cars were being run at a very moderate speed, not over seven or eight miles an hour, that the signals required by law were given, and that the child was not on the track over which the cars were passing, but on a side track near the main track.

¹¹ For discussion of principles, see Chapin on Torts, § 29.

So far as there was any conflict of evidence or question of fact, the questions were submitted to the jury. At the close of the plaintiff's case, the counsel for the defendant moved for a nonsuit upon the ground that it appeared that the deceased's negligence contributed to the injury and the motion was denied and an exception taken. After the evidence was all in, the judge was requested by the counsel for the defendant to charge the jury, in different forms, that if the deceased voluntarily placed himself in peril from which he received the injury, to save the child, whether the child was or was not in danger, the plaintiff could not recover and all the requests were refused and exceptions taken, and the question whether the negligence of the intestate contributed to the accident was submitted to the jury. The jury found a verdict for the plaintiff and the judgment entered thereon was affirmed, on appeal, by the Supreme Court and from the latter judgment the defendant has appealed to this court.

GROVER, J. The important question in this case arises upon the exception taken by the defendant's counsel to the denial of his motion for a nonsuit, made upon the ground that the negligence of the plaintiff's intestate contributed to the injury that caused his death. The evidence showed that the train was approaching in plain view of the deceased, and had he for his own purposes attempted to cross the track, or with a view to save property placed himself voluntarily in a position where he might have received an injury from a collision with the train, his conduct would have been grossly negligent, and no recovery could have been had for such injury. But the evidence further showed that there was a small child upon the track, who, if not rescued, must have been inevitably crushed by the rapidly approaching train. This the deceased saw, and he owed a duty of important obligation to this child to rescue it from its extreme peril, if he could do so without incurring great danger to himself. Negligence implies some act of commission or omission wrongful in itself. Under the circumstances in which the deceased was placed, it was not wrongful in him to make every effort in his power to rescue the child, compatible with a reasonable regard for his own safety. It was his duty to exercise his judgment as to whether he could probably save the child without serious injury to himself. If, from the appearances, he believed that he could, it was not negligence to make an attempt so to do, although believing that possibly he might fail and receive an injury himself. He had no time for deliberation. He must act instantly, if at all, as a moment's delay would have been fatal to the child. The law has so high a regard for human life that it will not impute negligence to an effort to preserve it, unless made under such circumstances as to constitute rashness in the judgment of prudent persons. For a person engaged in his ordinary affairs, or in the mere protection of property, knowingly and voluntarily to place himself in a position where he is liable to receive a serious injury, is negligence which will preclude a

recovery for an injury so received; but when the exposure is for the purpose of saving life it is not wrongful, and therefore not negligent, unless such as to be regarded either rash or reckless. The jury were warranted in finding the deceased free from negligence under the rule as above stated. The motion for a nonsuit was therefore properly denied. That the jury were warranted in finding the defendant guilty of negligence in running the train in the manner it was running requires no discussion. None of the exceptions taken to the charge as given, or to the refusals to charge as requested, affect the right of recovery. Upon the principle above stated, the judgment appealed from must be affirmed, with costs.

CHURCH, C. J., and PECKHAM and RAPALLO, JJ., concur.

ALLEN, J., wrote a dissenting opinion, in which FOLGER, J., concurred.

Judgment affirmed.

DEFENSES

I. Necessity ¹

SUROCCO v. GEARY.

(Supreme Court of California, 1853. 3 Cal. 69, 58 Am. Dec. 385.)

MURRAY, Chief Justice,² delivered the opinion of the court. HEYDENFELDT, Justice, concurred.

This was an action, commenced in the court below, to recover damages for blowing up and destroying the plaintiffs' house and property, during the fire of the 24th of December, 1849.

Geary, at that time Alcalde of San Francisco, justified, on the ground that he had authority, by virtue of his office, to destroy said building, and also that it had been blown up by him to stop the progress of the conflagration then raging.

It was in proof that the fire passed over and burned beyond the building of the plaintiffs, and that at the time said building was destroyed they were engaged in removing their property, and could, had they not been prevented, have succeeded in removing more, if not all of their goods.

The cause was tried by the court sitting as a jury, and a verdict rendered for the plaintiffs, from which the defendant prosecutes this appeal under the Practice Act of 1850.

The only question for our consideration is whether the person who tears down or destroys the house of another, in good faith, and under apparent necessity, during the time of a conflagration, for the purpose of saving the buildings adjacent, and stopping its progress, can be held personally liable in an action by the owner of the property destroyed.

This point has been so well settled in the courts of New York and New Jersey that a reference to those authorities is all that is necessary to determine the present case.

The right to destroy property, to prevent the spread of a conflagration, has been traced to the highest law of necessity, and the natural rights of man, independent of society or civil government. "It is referred by moralists and jurists to the same great principle which justifies the exclusive appropriation of a plank in a shipwreck, though the life of another be sacrificed; with the throwing overboard goods in a tempest, for the safety of a vessel; with the trespassing upon the

¹ For discussion of principles, see Chapin on Torts, § 36.

² The statement of facts is omitted.

lands of another, to escape death by an enemy. It rests upon the maxim, *Necessitas inducit privilegium quod jura privata.*"

The common law adopts the principles of the natural law, and places the justification of an act otherwise tortious precisely on the same ground of necessity. See *American Print Works v. Lawrence*, 21 N. J. Law, 248, and the cases there cited.

This principle has been familiarly recognized by the books from the time of the Saltpetre Case, and the instances of tearing down houses to prevent a conflagration, or to raise bulwarks for the defence of a city, are made use of as illustrations, rather than as abstract cases, in which its exercise is permitted. At such times the individual rights of property give way to the higher laws of impending necessity.

A house on fire, or those in its immediate vicinity, which serve to communicate the flames, becomes a nuisance, which it is lawful to abate, and the private rights of the individual yield to the considerations of general convenience, and the interests of society. Were it otherwise, one stubborn person might involve a whole city in ruin by refusing to allow the destruction of a building which would cut off the flames and check the progress of the fire, and that, too, when it was perfectly evident that his building must be consumed.

The respondent has invoked the aid of the constitutional provision which prohibits the taking of private property for public use, without just compensation being made therefor. This is not "a taking of private property for public use," within the meaning of the Constitution.

The right of taking individual property for public purposes belongs to the state, by virtue of her right of eminent domain, and is said to be justified on the ground of state necessity; but this is not a taking or a destruction for a public purpose, but a destruction for the benefit of the individual or the city, but not properly of the state.

The counsel for the respondent has asked, Who is to judge of the necessity of the destruction of property?

This must, in some instances, be a difficult matter to determine. The necessity of blowing up a house may not exist, or be as apparent to the owner, whose judgment is clouded by interest, and the hope of saving his property, as to others. In all such cases the conduct of the individual must be regulated by his own judgment as to the exigencies of the case. If a building should be torn down without apparent or actual necessity, the parties concerned would undoubtedly be liable in an action of trespass. But in every case the necessity must be clearly shown. It is true many cases of hardship may grow out of this rule, and property may often in such cases be destroyed, without necessity, by irresponsible persons; but this difficulty would not be obviated by making the parties responsible in every case, whether the necessity existed or not.

The Legislature of the state possesses the power to regulate this subject by providing the manner in which buildings may be destroyed

and the mode in which compensation shall be made; and it is to be hoped that something will be done to obviate the difficulty, and prevent the happening of such events as those supposed by the respondent's counsel.

In the absence of any legislation on the subject, we are compelled to fall back upon the rules of the common law.

The evidence in this case clearly establishes the fact that the blowing up of the house was necessary, as it would have been consumed had it been left standing. The plaintiffs cannot recover for the value of the goods which they might have saved; they were as much subject to the necessities of the occasion as the house in which they were situate; and if in such cases a party was held liable, it would too frequently happen that the delay caused by the removal of the goods would render the destruction of the house useless.

The court below clearly erred as to the law applicable to the facts of this case. The testimony will not warrant a verdict against the defendant.

Judgment reversed.

PROCTOR v. ADAMS.

(Supreme Judicial Court of Massachusetts, 1873. 113 Mass. 376, 18 Am. Rep. 500.)

Tort, in the nature of a trespass quare clausum, for entering the plaintiff's close and carrying away a boat. At the trial it appeared that the premises described in the declaration were a sandy beach on the sea side of Plum Island, and that the defendants went there, between high and low water mark, January 19, 1873, and against the objection and remonstrances of the plaintiff's tenant, carried away a boat worth \$50, which they found lying there. The defendants offered evidence that upon the night of January 18, 1873, there was a severe storm; that the next morning they went upon the beach to see if any vessels or property had been cast ashore; that they found a boat lying upon the beach twenty-five feet below high water mark, which had apparently been driven ashore in the storm; that in order to save it, they endeavored to haul it upon the beach, and succeeded in putting it near the line of high water mark; that, not thinking it secure, they, the next day, pushed it into the water, and carried it around into Plum Island river, on the inside of the island; that they at once advertised it in the Ipswich and Newburyport papers; that they shortly afterwards delivered it to one Jackman, who claimed it as agent for the underwriters of the wrecked steamer Sir Francis, and who paid them \$12 for their services and expenses.

The court ruled that these facts, if proved, would not constitute a defence, and proposed to instruct the jury as follows:

"If the land upon which the boat was found and taken possession of by the defendants was in possession or occupation of the plaintiff, the defendants' entry upon it without permission of the plaintiff was an unlawful entry.

"If the defendants, having made an unlawful entry upon the plaintiff's land, there took and therefrom carried a boat, for any purpose affecting the boat as derelict or wrecked property, they are liable to the plaintiff for their unlawful entry upon the land in nominal damage, and also, the boat not being their property, but a wreck, in damages for the unlawful taking and carrying away of the boat, to the value of the boat."

The defendants requested the court to rule that, upon the case presented, the law would imply a license, but the court declined so to rule. The defendants then declined to go to the jury, and the court instructed the jury to return a verdict for the plaintiff for \$51, and reported the case to this court.

GRAY, C. J. The boat, having been cast ashore by the sea, was a wreck, in the strictest legal sense. 3 Bl. Com. 106; *Chase v. Corcoran*, 106 Mass. 286, 288. Neither the finders of the boat, nor the owner of the beach, nor the commonwealth, had any title to the boat as against its former owner. Body of Liberties, art. 90; Anc. Chart. 211; 2 Mass. Col. Rec. 143; St. 1814-15, c. 169; Rev. St. 1836, c. 57; Gen. St. 1860, c. 81; 3 Dane, Ab. 134, 136, 138, 144; 2 Kent, Com. 322, 359. But the owner of the land on which the boat was cast was under no duty to save it for him. *Sutton v. Buck*, 2 Taunt. 302, 312.

If the boat, being upon land between high and low water mark, owned or occupied by the plaintiff, was taken by the defendants, claiming it as their own, when it was not, the plaintiff had a sufficient right of possession to maintain an action against them. *Barker v. Bates*, 13 Pick. 255, 23 Am. Dec. 678; *Dunwick v. Sterry*, 1 B. & Ad. 831. But if, as the evidence offered by them tended to show, the boat was in danger of being carried off by the sea, and they, before the plaintiff had taken possession of it, removed it for the purpose of saving it and restoring it to its lawful owner, they were not trespassers. In such a case, though they had no permission from the plaintiff or any other person, they had an implied license by law to enter on the beach to save the property. It is a very ancient rule of common law that an entry upon land to save goods which are in jeopardy of being lost or destroyed by water, fire, or any like danger, is not a trespass. 21 H. VII, 27, 28, pl. 5; Bro. Ab. Trespass, 213; Vin. Ab. Trespass (H. a. 4) pl. 24 ad fin.; (K. a.) pl. 3. In *Dunwick v. Sterry*, 1 B. & Ad. 831, a case very like this, Mr. Justice Parke (afterwards Baron Parke and Lord Wensleydale) left it to the jury to say whether the defendant took the property for the benefit of the owners, or under a claim of his own and to put the plaintiffs to proof of their title. In *Barker v. Bates*, 13 Pick. 255, 23 Am. Dec. 678, upon which the plain-

tiff mainly relies, the only right claimed by the defendants was as finders of the property and for their own benefit.

The defendants are therefore entitled to a new trial. As the answer was not objected to, and the declaration may be amended in the court below, we have not considered the form of the pleadings.

New trial ordered.

II. Acts of State ³

BURON v. DENMAN.

(Court of Exchequer, 1848. 2 Exch. 167.)

The defendant, a naval commander, stationed off the coast of Africa, with instructions to suppress the slave trade, fired the barracoons of plaintiff, a Spaniard, and liberated the slaves. These proceedings were reported to the Lords of the Admiralty and to the Foreign and Colonial Secretaries of State, and were adopted and ratified by them.

PARKE, B.⁴ (in summing up). * * * The principal question is whether the conduct of the defendant, in carrying away the slaves, and committing the other alleged trespasses, can be justified as an act of state, done by authority of the Crown. It is not contended that there was any previous authority. If the defendant had merely instructions according to the terms of the treaty set out in the act of Parliament, those instructions would only have extended to the stopping of ships in the high seas, within the limits agreed to by the treaty with the Spanish crown. Therefore the justification of the defendant depends upon the subsequent ratification of his acts. A well-known maxim of the law between private individuals is, "*Omnis ratihabitio retrotrahitur et mandato æquiparatur.*" If, for instance, a bailiff distrains goods, he may justify the act either by a previous or subsequent authority from the landlord; for, if an act be done by a person *as agent*, it is in general immaterial whether the authority be given prior or subsequent to the act. If the bailiff so authorized be a trespasser, the person whose goods are seized has his remedy against the principal. Therefore, generally speaking, between subject and subject, a subsequent ratification of an act done *as agent* is equal to a prior authority. That, however, is *not* universally true. In the case of a tenant from year to year, who has, by law, a right to a half year's notice to quit, if such notice be given by an agent, without the authority of the landlord, the tenant is not bound by it. Such being the law between private individuals, the question is, whether the act of the sovereign, ratify-

³ For discussion of principles, see Chapin on Torts, § 36.

⁴ The statement of facts is rewritten and a portion of the opinion is omitted.

ing the act of one of his officers, can be distinguished. On that subject I have conferred with my learned brethren, and they are decidedly of opinion that the ratification of the Crown, communicated as it has been in the present case, is equivalent to a prior command. I do not say that I dissent; but I express my concurrence in their opinion with some doubt, because, on reflection, there appears to me a considerable distinction between the present case and the ordinary case of ratification by subsequent authority between private individuals. If an individual ratifies an act done on his behalf, the nature of the act remains unchanged, it is still a mere trespass, and the party injured has his option to sue either; if the Crown ratifies an act, the character of the act becomes altered, for the ratification does not give the party injured the double option of bringing his action against the agent who committed the trespass or the principal who ratified it, but a remedy against the Crown only (such as it is), and actually exempts from all liability the person who commits the trespass. Whether the remedy against the Crown is to be pursued by petition of right, or whether the injury is an act of state without remedy, except by appeal to the justice of the state which inflicts it, or by application of the individual suffering to the government of his country, to insist upon compensation from the government of this—in either view, the wrong is no longer actionable. I do not feel so strong upon the point as to say that I dissent from the opinion of my learned brethren; therefore you have to take it as the direction of the court, that if the Crown, with knowledge of what has been done, ratified the defendant's act by the Secretaries of State or the Lords of the Admiralty, this action cannot be maintained. In the documents which have been read there is ample evidence of ratification, for the Secretary of State for Foreign Affairs, the Lords of the Admiralty, and the Secretary of State for the Colonial Department, on receiving the report of the Governor of Sierra Leone, and the account of the transactions given by the defendant himself, expressed their approbation of what he had done. The acts, indeed, have never been published, and that is one of the circumstances which created a doubt in my mind. But, although the ratification was not known before this action was commenced, that fact makes no difference in the opinion of the court. A previous command would be unknown, if given verbally; and a subsequent ratification, though unknown, will have the same effect.

It is argued, on the part of the plaintiff, that the Crown can only speak by an authentic instrument under the Great Seal, and that, therefore, the ratification ought to have been under the Great Seal. We are clearly of opinion that, as the original act would have been an act of the Crown, if communicated by a written or parol direction from the Board of Admiralty, so this ratification, communicated in the way it has been, is equally good. I should observe that the court are of opinion that it is not necessary for the defendant to prove the pleas

which expressly state the authority of the Crown; for if this act, by adoption, becomes the act of the Crown, the seizure of the slaves and goods by the defendant is a seizure by the Crown, and an act of state for which the defendant is irresponsible, and, therefore, entitled to a verdict on the plea of "Not guilty."

The jury found that the Crown had ratified the act of the defendant, with full knowledge of what he had done, whereupon a verdict was taken for him on the fourth, ninth, and sixteenth pleas. A verdict was found for the plaintiff on the pleas of not possessed of the slaves and goods and the plea of "Not guilty," was entered, by consent, for the plaintiff.

F. Robinson tendered a bill of exceptions to the above ruling; but the plaintiff afterwards obtained an order to discontinue, certain terms of settlement of this and other similar actions having been agreed to.

III. Illegal Conduct of Plaintiff ⁵

WELCH v. WESSON.

(Supreme Judicial Court of Massachusetts, 1856. 6 Gray, 505.)

Action of tort for running down the plaintiff on the highway and breaking his sleigh.

MERRICK, J. It appears from the bill of exceptions to have been fully proved upon the trial that the defendant willfully ran down the plaintiff and broke his sleigh, as is alleged in the declaration. No justification or legal excuse of this act was asserted or attempted to be shown by the defendant; but he was permitted, against the plaintiff's objection, to introduce evidence tending to prove that it was done while the parties were trotting horses in competition with each other for a purse of money, the ownership of which was to be determined by the issue of the race. And it was ruled by the presiding judge that, if this fact was established, no action could be maintained by the plaintiff to recover compensation for the damages he had sustained, even though the injury complained of was willfully inflicted. Under such instructions, the jury returned a verdict for the defendant.

We presume it may be assumed as an undisputed principle of law that no action will lie to recover a demand, or a supposed claim for damages, if, to establish it, the plaintiff requires aid from an illegal transaction or is under the necessity of showing, and depending in any degree upon an illegal agreement, to which he himself had been a party. Gregg v. Wyman, 4 Cush. 322; Woodman v. Hubbard, 25 N. H. 67,

⁵ For discussion of principles, see Chapin on Torts, § 36.

57 Am. Dec. 310; *Phalen v. Clark*, 19 Conn. 421, 50 Am. Dec. 253; *Simpson v. Bloss*, 7 Taunt. 246. But this principle will not sustain the ruling of the court, which went far beyond it, and laid down a much broader and more comprehensive doctrine. Taken without qualification, and just as they were given to the jury, the instructions import that, if two persons are engaged in the same unlawful enterprise, each of them, during the continuance of such engagement, is irresponsible for willful injuries done to the property of the other. No such proposition as this can be true. He who violates the law must suffer its penalties; but yet in all other respects he is under its protection, and entitled to the benefit of its remedies.

But in this case the plaintiff had no occasion to show, in order to maintain his action, that he was engaged, at the time his property was injured, in any unlawful pursuit, or that he had previously made any illegal contract. It is true that, when he suffered the injury, he was acting in violation of the law; for all horse trotting upon wagers for money is expressly declared by statute to be a misdemeanor punishable by fine and imprisonment. St. 1846, c. 200. But neither the contract nor the race had, as far as appears from the facts reported in the bill of exceptions, or from the intimations of the court in its ruling, anything to do with the trespass committed upon the property of the plaintiff. That he had no occasion to show into what stipulations the parties had entered, or what were the rules or regulations by which they were to be governed in the race, or whether they were in fact engaged in any such business at all, is apparent from the course of the proceeding at the trial. The plaintiff introduced evidence tending to prove the wrongful acts complained of in the writ, and the damage done to his property, and there rested his case. If nothing more had been shown, he would clearly have been entitled to recover. He had not attempted to derive assistance either from an illegal contract or an illegal transaction. It was the defendant, and not the plaintiff, who had occasion to invoke assistance from proof of the illegal agreement and conduct in which both parties had equally participated. From such sources neither of the parties should have been permitted to derive a benefit. The plaintiff sought nothing of this kind, and the mutual misconduct of the parties in one particular cannot exempt the defendant from his obligation to respond for the injurious consequences of his own illegal misbehavior in another.

Exceptions sustained.

IV. License *

EVANS v. WAITE.

(Supreme Court of Wisconsin, 1892. 83 Wis. 286, 53 N. W. 445.)

This is an action to recover damages for personal injuries alleged to have been inflicted by defendant upon plaintiff. It is charged in the complaint that: "On July 4, 1891, while the plaintiff was lawfully riding on horseback on the public highway in company with defendant, the defendant being then and there armed with a revolver loaded with powder and a leaden ball, negligently and carelessly discharged the said revolver so that the ball therefrom struck the plaintiff in the hip, and passed on through the flesh into his thigh where it became lodged and imbedded so that it was impracticable to remove the same, and that the said ball so fired from the revolver in the hands of the defendant caused a deep, painful and dangerous wound."

It is further alleged that the defendant is a minor of about the age of eighteen years.

The defendant answered by his guardian: (1) A general denial; and (2) that the plaintiff was guilty of contributory negligence in that he enticed the defendant to go with him for the purpose of shooting, and that while the parties were shooting the plaintiff was accidentally injured, and not through any negligence of the defendant.

On the trial it was proved that the defendant was a minor; that on the occasion mentioned in the pleadings he was armed with a revolver; and that the plaintiff was wounded, as charged in the complaint, by a bullet discharged from the revolver by accident, when in the hands of the defendant. The circuit judge held that, because the defendant was a minor and was armed with a revolver in violation of chapter 329, Laws of 1883 (S. & B. Ann. St. § 4397b), he was liable to the plaintiff for the injury, without regard to the question of negligence. Thereupon the jury were instructed to find for the plaintiff and to assess damages for the injury. The court confined the recovery to compensatory damages. The jury assessed plaintiff's damages at \$375, nearly \$150 of which was for actual necessary expenses incurred by the plaintiff, and for loss of time by reason of the injury. A motion for a new trial was denied, and judgment entered for the plaintiff pursuant to the verdict. The defendant appeals from the judgment.

LYON, C. J. In *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538, it was held that if two persons, by mutual consent, in anger fight together, each is liable to the other for actual damages.

* For discussion of principles, see Chapin on Torts, § 36.

The fighting being unlawful, the consent of either party is no bar to the action. The authorities upon which the decision is based are cited in the opinion. The rule of that case applies here. It was unlawful for the defendant to be armed with a revolver when the plaintiff was injured, and hence he is liable for any injury inflicted by him with such weapon. It is immaterial that the plaintiff was consenting to the defendant being so armed and to his use of the revolver. Such is the rule of *Shay v. Thompson*, 59 Wis. 540, 18 N. W. 473, 48 Am. Rep. 538. The only effect of such consent was to confine the recovery to compensatory damages, and it was so restricted.

The question of negligence is also immaterial. True the complaint charges that the defendant was negligent, but it also contains a sufficient statement of a cause of action based upon the fact that the defendant was unlawfully armed with the revolver with which he wounded the plaintiff. Were there any defect in the complaint in that view of the case, it was amendable, for the whole transaction was fully proved on the trial without objection. This brings the case within the rule which allows the pleading to be amended to correspond with the proofs, or permits a variance between the pleadings and proofs to be disregarded. We fail to find any error disclosed in the record.

BY THE COURT. The judgment of the circuit court is affirmed.

V. Release and Covenant Not to Sue[†]

GILBERT v. FINCH.

(Court of Appeals of New York, 1903. 173 N. Y. 455, 66 N. E. 133, 61 L. R. A. 807, 93 Am. St. Rep. 623.)

This action was brought by plaintiff as receiver of the Commercial Alliance Insurance Company against defendants as directors of that company to recover \$10,000 and interest. The evidence at the trial tended to show that defendants, as directors had entered into negotiations with ten surviving incorporators of the Maine & New Brunswick Insurance Company for the purchase and control of that company, which negotiations were finally consummated on May 3, 1893, by the president of the Commercial Alliance Company, who, acting pursuant to the directions of the defendants, paid \$35,000 from the funds of the company to the ten surviving incorporators of the Maine & New Brunswick Company, taking an assignment of all their rights in the latter. After plaintiff's appointment as receiver he brought an action against the ten surviving incorporators of the Maine & New Brunswick Company to recover back the \$35,000. This was compro-

[†] For discussion of principles, see Chapin on Torts, § 37.

mised, the plaintiff receiving \$25,000, and he thereupon executed and delivered to the surviving incorporators a release of all claims and demands which provided that "the execution of this instrument shall not affect any cause of action of the receiver against any person not named herein."

HAIGHT, J.⁸ * * * In considering the effect of the release, we shall assume that the defendants were joint tort-feasors with the Maine incorporators, and that the release, under seal, of a claim given to one joint tort-feasor, operates as a release of all. *Barrett v. Third Ave. R. R. Co.*, 45 N. Y. 628, 635, and cases there cited. This rule is founded upon the theory that a party is entitled to but one satisfaction for the injury sustained by him. The claim of the plaintiff, as we have seen, was for \$35,000. The settlement was for \$25,000, leaving \$10,000 of the original claim unpaid and unsatisfied. The instrument given to the Maine incorporators upon the settlement of the plaintiff's suit against them released and discharged them from all further claims or demands, so far as the plaintiff was concerned, but it was expressly provided in the instrument that it should not affect any cause of action on behalf of the receiver against any other person. The purpose of this reservation is very evident. The receiver, doubtless, intended to pursue the defendants for the balance of the claim. The instrument, therefore, does not purport—neither was it intended—to be a full and complete settlement of the plaintiff's entire claim. Reservations of this character in releases are not uncommon, and their effect has been the subject of frequent adjudication by the courts. It is quite true that the courts of our sister states have reached different conclusions upon the question, and that a sharp conflict exists in the courts of our own state—as, for instance, *Matthews v. Chicopee Mfg. Co.*, 26 N. Y. Super. Ct. 712, and *Commercial Nat. Bank v. Taylor*, 64 Hun, 499, 19 N. Y. Supp. 533, on one side, and *Mitchell v. Allen*, 25 Hun, 543, *Delong v. Curtis*, 35 Hun, 94, and *Brogan v. Hannan*, 55 App. Div. 92, 66 N. Y. Supp. 1066, upon the other side. In England the modern authorities appear to be quite uniform upon the question. They are to the effect that, as between joint debtors and joint tort-feasors, a release given to one releases all; but, if the instrument contains a reservation of a right to sue the other joint debtors or tort-feasors, it is not a release, but, in effect, is a covenant not to sue the person released, and a covenant not to sue does not release a joint debtor or a joint tort-feasor.

In the case of *Duck v. Mayeu*, [1892] 2 Q. B. 511, the question was as to whether the plaintiff had released a joint tort-feasor. He had accepted from one a sum of money, but without prejudice to his claim against the other. *Smith, L. J.*, in delivering the opinion of the court, said with reference thereto: "In determining whether the document

⁸ The statement of facts as contained in the opinion is abridged and other portions of the opinion are omitted.

be a release or a covenant not to sue, the intention of the parties was to be carried out; and, if it were clear that the right against a joint debtor was intended to be preserved, inasmuch as such right would not be preserved if the document were held to be a release, the proper construction, where this was sought to be done, was that it was a covenant not to sue, and not a release. In the case of *Bateson v. Gosling*, at nisi prius, the same canon of construction was applied, and it was held that the release being, as it was, limited by a proviso reserving rights against the surety, it must be taken that it was a covenant not to sue, and not a release; and this ruling was unanimously upheld by the court of common pleas, as reported in *Law Rep. 7 C. P. p. 9*."

In *Price v. Barker*, 4 El. & Bl. 760, Coleridge, J., says: "With regard to the first question, two modes of construction are for consideration: One, that, according to the earlier authorities, the primary intention of releasing the debt is to be carried out, and the subsequent provision for reserving remedies against co-obligors and co-contractors should be rejected as inconsistent with the intention to release and destroy the debt evinced by the general words of the release, and as something which the law will not allow, as being repugnant to such release and extinguishment of the debt; the other, that, according to the modern authorities, we are to mold and limit the general words of the release by construing it to be a covenant not to sue, and thereby allow the parties to carry out the whole of their intentions by preserving their rights against parties jointly liable. We quite agree with the doctrine laid down by Lord Denman in *Nicholson v. Revill*, 4 Adol. & E. 675, as explained by Baron Parke in *Kearsley v. Cole*, 16 Mees. & W. 136, that, if the deed is taken to operate as a release, the right against a party jointly liable cannot be preserved; and we think that we are bound by modern authorities (see *Solly v. Forbes*, 2 Brod. & B. 38; *Thompson v. Lack*, 3 C. B. 540; and *Payler v. Homersham*, 4 Maule & S. 423) to carry out the whole intention of the parties as far as possible, by holding the present to be a covenant not to sue, and not a release." See, also, *Currey v. Armitage*, 6 Wkly. Rep. (Eng.) 516.

In the case of *McCrillis v. Hawes*, 38 Me. 566, one Lewis and the defendant were charged as joint trespassers upon the plaintiff's premises. They had taken 100 sticks of pine timber. The plaintiff settled with Lewis for one half of the property taken, and brought action against the defendant for the other half. It was held that the action could be maintained, and that the settlement was not a release as to the whole claim.

In the case of *Ellis v. Esson*, 50 Wis. 138, 6 N. W. 518, 36 Am. Rep. 830, it was held that the instrument given to one of several joint wrongdoers is not a technical release if it appears from the paper that it was not the intention of the injured person to release his cause of action against all the wrongdoers, and that the sum received was not

in fact a full compensation for his injury, nor intended to be such by the parties to the agreement.

In *Sloan v. Herrick*, 49 Vt. 327, it was held that the release of one joint tort-feasor on payment of part satisfaction, when it is expressed in the release that the sum paid is received only in part satisfaction, will not operate to bar the injured party from pursuing the other joint tort-feasor for so much of the tort as remains unsatisfied.

We have thus called attention to the English authorities and those of some of our sister states. We have also referred to some of the conflicting cases in our own courts. The question appears to have first received attention here in *Kirby v. Taylor*, 6 Johns. Ch. 250, 253, in which it was held that a release is to be construed according to the clear intention of the parties, and, where it contains a reservation, the other obligee was not discharged. In the case of *Irvine v. Millbank*, 56 N. Y. 635, more fully reported in 15 Abb. Prac. (N. S.) 378, the release was, by its terms, to be without prejudice to the rights of the plaintiff as against the other defendants. *Folger, J.*, in delivering the opinion of the court, said that this instrument was not a technical release, which it must be to operate as a discharge of a joint tort-feasor. And finally, in the case of *Whittemore v. Judd Linseed & Sperm Oil Co.*, 124 N. Y. 565, 27 N. E. 244, 21 Am. St. Rep. 708, the question was examined by *Brown, J.*, and the conclusion reached that, where a release of one of two joint debtors contains an express provision that it shall not affect or impair the claim of the creditor against the other debtor, the latter is not discharged. It thus appears that the decisions of this court are in accord with the English rule, and in harmony with our statute in reference to joint debtors. Code Civ. Proc. §§ 1942, 1944. They give force and effect to the intention of the parties to the instrument, which, we think, is more just, and the wiser and safer rule. Where the release contains no reservation, it operates to discharge all the joint tort-feasors; but, where the instrument expressly reserves the right to pursue the others, it is not technically a release, but a covenant not to sue, and they are not discharged. It follows that the release, so called, did not operate to discharge the defendants.

The order of the appellate division should be affirmed, and judgment absolute ordered in favor of the plaintiff upon the stipulation, with costs.

PARKER, C. J., and GRAY, BARTLETT, CULLEN, and WERNER, JJ., concur. O'BRIEN, J., absent.

Order affirmed.

PARTIES

I. Public Officers

1. JUDICIAL OFFICERS¹

BRADLEY v. FISHER.

(Supreme Court of the United States, 1871. 13 Wall. 335, 20 L. Ed. 646.)

FIELD, J.² In 1867 the plaintiff was a member of the bar of the supreme court of the District of Columbia, and the defendant was one of the justices of that court. In June of that year the trial of one John H. Suratt for the murder of Abraham Lincoln was commenced in the criminal court of the district, and was continued until the 10th of the following August, when the jury were discharged in consequence of their inability to agree upon a verdict. The defendant held that court, presiding at the trial of Suratt from its commencement to its close, and the plaintiff was one of the attorneys who defended the prisoner. Immediately upon the discharge of the jury, the court, thus held by the defendant, directed an order to be entered on its records striking the name of the plaintiff from the roll of attorneys practicing in that court. The order was accompanied by a recital that on the second of July preceding, during the progress of the trial of Suratt, immediately after the court had taken a recess for the day, as the presiding judge was descending from the bench he had been accosted in a rude and insulting manner by the plaintiff, charging him with having offered the plaintiff a series of insults from the bench from the commencement of the trial; that the judge had then disclaimed any intention of passing any insult whatever, and had assured the plaintiff that he entertained for him no other feelings than those of respect; but that the plaintiff, so far from accepting this explanation or disclaimer, had threatened the judge with personal chastisement. The plaintiff appears to have regarded this order of the criminal court as an order disbaring him from the supreme court of the District; and the whole theory of the present action proceeds upon that hypothesis. * * *

The plea, as will be seen from our statement of it, not only sets up that the order of which the plaintiff complains was an order of the criminal court, but that it was made by the defendant in the lawful

¹ For discussion of principles, see Chapin on Torts, § 41.

² The statement of fact, portions of the opinion of Justice Field, and the dissenting opinion of Justice Davis (with whom Justice Clifford concurred) are omitted.

exercise and performance of his authority and duty as its presiding justice. In other words, it sets up that the order for the entry of which the suit is brought was a judicial act, done by the defendant as the presiding justice of a court of general criminal jurisdiction. If such were the character of the act and the jurisdiction of the court, the defendant cannot be subjected to responsibility for it in a civil action, however erroneous the act may have been, and however injurious in its consequences it may have proved to the plaintiff. For it is a general principle of the highest importance to the proper administration of justice that a judicial officer, in exercising the authority vested in him, shall be free to act upon his own convictions, without apprehension of personal consequences to himself. Liability to answer to every one who might feel himself aggrieved by the action of the judge would be inconsistent with the possession of this freedom, and would destroy that independence without which no judiciary can be either respectable or useful. As observed by a distinguished English judge, it would establish the weakness of judicial authority in a degrading responsibility. Justice Mayne, in *Taafe v. Downes*, reported in a note to 3 Moore's Privy Council, 41.

The principle, therefore, which exempts judges of courts of superior or general authority from liability in a civil action for acts done by them in the exercise of their judicial functions, obtains in all countries where there is any well-ordered system of jurisprudence. It has been the settled doctrine of the English courts for many centuries, and has never been denied, that we are aware of, in the courts of this country. It has, as Chancellor Kent observes, "a deep root in the common law." *Yates v. Lansing*, 5 Johns. (N. Y.) 291.

Nor can this exemption of the judges from civil liability be affected by the motives with which their judicial acts are performed. The purity of their motives cannot in this way be the subject of judicial inquiry. This was adjudged in the Case of Floyd and Barker, reported by Coke, in 1608 (12 Coke, 25), where it was laid down that the judges of the realm could not be drawn in question for any supposed corruption impeaching the verity of their records, except before the king himself; and it was observed that, if they were required to answer otherwise, it would "tend to the scandal and subversion of all justice, and those who are the most sincere would not be free from continual calumniations." The truth of this latter observation is manifest to all persons having much experience with judicial proceedings in the superior courts. Controversies involving not merely great pecuniary interests, but the liberty and character of the parties, and consequently exciting the deepest feelings, are being constantly determined in those courts, in which there is great conflict in the evidence, and great doubt as to the law which should govern their decision. It is this class of cases which imposes upon the judge the severest labor, and often creates in his mind a painful sense of responsibility. Yet it

is precisely in this class of cases that the losing party feels most keenly the decision against him, and most readily accepts anything but the soundness of the decision in explanation of the action of the judge. Just in proportion to the strength of his convictions of the correctness of his own view of the case is he apt to complain of the judgment against him, and from complaints of the judgment to pass to the ascription of improper motives to the judge. When the controversy involves questions affecting large amounts of property, or relates to a matter of general public concern, or touches the interests of numerous parties, the disappointment occasioned by an adverse decision often finds vent in imputations of this character, and from the imperfection of human nature this is hardly a subject of wonder. If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons sufficiently irritated to institute an action against a judge for his judicial acts would hesitate to ascribe any character to the acts which would be essential to the maintenance of the action. If, upon such allegations, a judge could be compelled to answer in a civil action for his judicial acts, not only would his office be degraded and his usefulness destroyed, but he would be subjected for his protection to the necessity of preserving a complete record of all the evidence produced before him in every litigated case, and of the authorities cited and arguments presented, in order that he might be able to show, to the judge before whom he might be summoned by the losing party,—and that judge, perhaps, one of an inferior jurisdiction—that he had decided as he did with judicial integrity; and the second judge would be subjected to a similar burden, as he, in his turn, might also be held amenable by the losing party. * * *

In the present case we have looked into the authorities, and are clear from them, as well as from the principle on which any exemption is maintained, that * * * judges of courts of superior or general jurisdiction are not liable to civil actions for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously or corruptly. A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. Where there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority; and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible. But where jurisdiction over the subject-matter is invested by law in the judge, or in the court which he holds, the manner and extent in which the jurisdiction shall be exercised are generally as much questions for his determination as any other questions involved in the case, although upon the correctness of his determination in these particulars the valid-

ity of his judgments may depend. Thus if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court, and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense, which is not by the law made an offense, and proceed to the arrest and trial of a party charged with such act, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised. And the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit where there is jurisdiction of both subject and person applies in cases of this kind, and for the same reasons.

The distinction here made between acts done in excess of jurisdiction, and acts where no jurisdiction whatever over the subject-matter exists, was taken by the court of king's bench in *Ackerley v. Parkinson*, 3 Maule & Selwyn, 411. In that case an action was brought against the vicar-general of the bishop of Chester, and his surrogate, who held the consistorial and episcopal court of the bishop, for excommunicating the plaintiff with the greater excommunication for contumacy, in not taking upon himself the administration of an intestate's effects, to whom the plaintiff was next of kin; the citation issued to him being void, and having been so adjudged. The question presented was whether, under these circumstances, the action would lie. The citation being void, the plaintiff had not been legally brought before the court, and the subsequent proceedings were set aside, on appeal, on that ground. Lord Ellenborough observed that it was his opinion that the action was not maintainable if the ecclesiastical court had a general jurisdiction over the subject-matter, although the citation was a nullity, and said that "no authority had been cited to show that the judge would be liable to an action where he has jurisdiction, but has proceeded erroneously, or, as it is termed, *inverso ordine*." Mr. Justice Blanc said there was "a material distinction between a case where a party comes to an erroneous conclusion in a matter over which he has jurisdiction and a case where he acts wholly without jurisdiction,"

and held that where the subject-matter was within the jurisdiction of the judge, and the conclusion was erroneous, although the party should by reason of the error be entitled to have the conclusion set aside, and to be restored to his former rights, yet he was not entitled to claim compensation in damages for the injury done by such erroneous conclusion, as if the court had proceeded without any jurisdiction.

The exemption of judges of the superior courts of record from liability to civil suit for their judicial acts existing when there is jurisdiction of the subject-matter, though irregularity and error attended the exercise of the jurisdiction, the exemption cannot be affected by any consideration of the motives with which the acts are done. The allegation of malicious or corrupt motives could always be made, and, if the motives could be inquired into, judges would be subjected to the same vexatious litigation upon such allegations, whether the motives had nor had not any real existence. Against the consequences of their erroneous or irregular action, from whatever motives proceeding, the law has provided for private parties numerous remedies, and to those remedies they must, in such cases, resort. But for malice or corruption in their action, while exercising their judicial functions within the general scope of their jurisdiction, the judges of these courts can only be reached by public prosecution in the form of impeachment, or in such other form as may be specially prescribed.

If, now, we apply the principle thus stated, the question presented in this case is one of easy solution. The criminal court of the District, as a court of general criminal jurisdiction, possessed the power to strike the name of the plaintiff from its rolls as a practicing attorney. This power of removal from the bar is possessed by all courts which have authority to admit attorneys to practice. It is a power which should only be exercised for the most weighty reasons, such as would render the continuance of the attorney in practice incompatible with a proper respect of the court for itself, or a proper regard for the integrity of the profession; and except where matters occurring in open court, in presence of the judges, constitute the grounds of its action, the power of the court should never be exercised without notice to the offending party of the grounds of complaint against him, and affording him ample opportunity of explanation and defense. This is a rule of natural justice, and is as applicable to cases where a proceeding is taken to reach the right of an attorney to practice his profession as it is when the proceeding is taken to reach his real or personal property; and even where the matters constituting the grounds of complaint have occurred in open court, under the personal observation of the judges, the attorney should ordinarily be heard before the order of removal is made, for those matters may not be inconsistent with the absence of improper motives on his part, or may be susceptible of such explanation as would mitigate their offensive character, or he may be ready to make all proper reparation

and apology. Admission as an attorney is not obtained without years of labor and study. The office which the party thus acquires is one of value, and often becomes the source of great honor and emolument to its possessor. To most persons who enter the profession it is the means of support to themselves and their families. To deprive one of an office of this character would often be to decree poverty to himself, and destitution to his family. A removal from the bar should therefore never be decreed where any punishment less severe, such as reprimand, temporary suspension, or fine, would accomplish the end desired. But, on the other hand, the obligation which attorneys impliedly assume if they do not by express declaration take upon themselves, when they are admitted to the bar, is not merely to be obedient to the constitution and laws, but to maintain at all times the respect due to courts of justice and judicial officers. This obligation is not discharged by merely observing the rules of courteous demeanor in open court, but it includes abstaining out of court from all insulting language and offensive conduct towards the judges personally for their judicial acts. "In matters collateral to official duty," said Chief Justice Gibson in the case of *Austin and Others*, "the judge is on a level with the members of the bar as he is with his fellow-citizens his title to distinction and respect resting on no other foundation than his virtues and qualities as a man. But it is nevertheless evident that professional fidelity may be violated by acts which fall without the lines of professional functions, and which may have been performed out of the pale of the court. Such would be the consequences of beating or insulting a judge in the street for a judgment in court. No one would pretend that an attempt to control the deliberation of the bench by the apprehension of violence, and subject the judges to the power of those who are, or ought to be, subordinate to them, is compatible with professional duty, or the judicial independence so indispensable to the administration of justice. And an enormity of the sort, practiced but on a single judge, would be an offense as much against the court, which is bound to protect all its members, as if it had been repeated on the person of each of them, because the consequences to suitors and the public would be the same; and, whatever may be thought in such a case of the power to punish for contempt, there can be no doubt of the existence of a power to strike the offending attorney from the roll."

The order of removal complained of in this case recites that the plaintiff threatened the presiding justice of the criminal court, as he was descending from the bench, with personal chastisement for alleged conduct of the judge during the progress of a criminal trial then pending. The matters thus recited are stated as the grounds for the exercise of the power possessed by the court to strike the name of the plaintiff from the roll of attorneys practicing therein. It is not necessary for us to determine in this case whether, under any circum-

stances, the verity of this record can be impeached. It is sufficient to observe that it cannot be impeached in this action or in any civil action against the defendant; and, if the matters recited are taken as true, there was ample ground for the action of the court. A greater indignity could hardly be offered to a judge than to threaten him with personal chastisement for his conduct on the trial of a cause. A judge who should pass over in silence an offense of such gravity would soon find himself a subject of pity, rather than of respect.

The criminal court of the District erred in not citing the plaintiff, before making the order striking his name from the roll of its attorneys, to show cause why such order should not be made for the offensive language and conduct stated, and affording him opportunity for explanation, or defense, or apology. But this erroneous manner in which its jurisdiction was exercised, however it may have affected the validity of the act, did not make the act any less a judicial act; nor did it render the defendant liable to answer in damages for it at the suit of the plaintiff, as though the court had proceeded without having any jurisdiction whatever over its attorneys.

We find no error in the rulings of the court below, and its judgment must therefore be affirmed, and it is so ordered.

Judgment affirmed.

RUSH v. BUCKLEY.

(Supreme Judicial Court of Maine, 1905. 100 Me. 322, 61 Atl. 774, 70 L. R. A. 464, 4 Ann. Cas. 318.)

WISWELL, C. J.* The plaintiff had been arrested upon two occasions, brought before the Augusta municipal court, tried, convicted, sentenced to pay a fine in each case, and committed to jail in default of such payment, upon warrants issued by that court. The offense alleged in the complaint and warrant in each case was the violation of an ordinance of the city of Augusta regulating public carriages therein, and which prohibited all persons from driving such a carriage in the city of Augusta without a license therefor, under a penalty therein provided. In these two cases, reported and argued together, the plaintiff sues the judge of the municipal court who issued the warrants, the officer who served them, and the persons who made the two complaints for false imprisonment, upon the ground that the ordinance had never gone into effect, and was void, because it never had been published in some newspaper printed in Augusta, as required by the statute authorizing such ordinances. Rev. St. c. 4, § 93, par. 9.

* * *

We finally come to a consideration of the question as to whether, under the circumstances which have already been stated, the judge of

* The statement of facts and a portion of the opinion are omitted.

the municipal court is liable in damages to the plaintiff for any of the acts done by him. The rule is well established that judges of courts of superior jurisdiction are not liable to civil actions for their judicial acts, even where such acts are in excess of their jurisdiction. As to whether this immunity from civil liability is equally applicable to a judge of an inferior court, or to a magistrate of limited jurisdiction, is a question about which the authorities are not in entire accord. We favor the doctrine, towards which, we think, there is a strong tendency in more recent judicial opinion, that where a judge of an inferior court, or a magistrate, is invested by law with jurisdiction over the general subject-matter of an alleged offense—that is, has the power to hear and determine cases of the general class to which the proceeding in question belongs—and decides, although erroneously, that he has jurisdiction over the particular offense of which complaint is made to him, or that the facts charged in the complaint constitute an offense, and acts accordingly in entire good faith, such erroneous decision is a judicial one, for which he should not be, and is not, liable in damages to a party who has been thereby injured. We can perceive of no good reason why the judge of general local, but inferior, jurisdiction should not be as fully protected against the consequences of his erroneous judicial decision concerning a matter within the limits of his general jurisdiction over offenses of the same general nature as should judges of superior courts for their judicial mistakes.

In the application of this doctrine, the distinction must be observed between mere excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. This distinction was very clearly pointed out in the case of *Bradley v. Fisher*, 13 Wall. 335, 20 L. Ed. 646, a leading case upon the question of judicial liability. In illustration of this distinction, the court in that case said: "Thus, if a probate court, invested only with authority over wills and the settlement of estates of deceased persons, should proceed to try parties for public offenses, jurisdiction over the subject of offenses being entirely wanting in the court and this being necessarily known to its judge, his commission would afford no protection to him in the exercise of the usurped authority. But if, on the other hand, a judge of a criminal court, invested with general criminal jurisdiction over offenses committed within a certain district, should hold a particular act to be a public offense which is not by law made an offense, and proceed to the arrest and trial of a party charged with such acts, or should sentence a party convicted to a greater punishment than that authorized by the law upon its proper construction, no personal liability to civil action for such acts would attach to the judge, although those acts would be in excess of his jurisdiction, or of the jurisdiction of the court held by him; for these are particulars for his judicial consideration, whenever his general jurisdiction over the subject-matter is invoked. Indeed, some of the most difficult and embarrassing questions which a judicial

officer is called upon to consider and determine relate to his jurisdiction, or that of the court held by him, or the manner in which the jurisdiction shall be exercised; and the same principle of exemption from liability which obtains for errors committed in the ordinary prosecution of a suit, where there is jurisdiction of both subject and person, applies in cases of this kind, and for the same reasons." The particular appropriateness of this language above quoted to this case is apparent.

Numerous well-considered decisions of courts of high authority may be cited in support of the doctrine which we have already stated. In *Brooks v. Mangan*, 86 Mich. 576, 49 N. W. 633, 24 Am. St. Rep. 137, it was held that a justice of the peace, who acted in good faith, and who had jurisdiction of the person and of the subject-matter, was not civilly liable in damages to the person injured for holding an unconstitutional ordinance valid and enforcing it by imprisoning the person charged with the violation of it. In that case it is said: "The Constitution guaranties no man immunity from arrest. It guaranties him a fair and impartial trial. It has provided him with appellate courts, to which he may resort for the correction of errors committed by the inferior courts. With this he must be content. These inferior tribunals should be left to the exercise of their honest judgment, and when they have so exercised it they are exempt from civil liability for errors. This is the only rule which can secure a proper administration of our criminal laws. The interests of the individual must in such case yield to the interests of the public."

In *Robertson v. Parker*, 99 Wis. 652, 75 N. W. 423, 67 Am. St. Rep. 889, it was held that where a judge of limited or inferior jurisdiction secures jurisdiction of a person or cause, but in the progress of his investigation or proceeding decides that he has greater powers than he actually possessed, and therefore pronounces a judgment or sentence in excess of his powers and void, he is not personally answerable to a person subjected to imprisonment under such judgment. In *Grove v. Van Duyn*, 44 N. J. Law, 654, 43 Am. Rep. 412, where this question is considerably discussed, the court said in its opinion: "The assertion, I think, may be safely made that the great weight of judicial opinion is in opposition to the theory that if a judge, as a matter of law and fact, has not jurisdiction over the particular case, thereby in all cases he incurs a liability to be sued by any one injuriously affected by his assumption of cognizance over it. The doctrine that an officer, having general powers of adjudication, must at his peril pass upon the question, which is often one difficult of solution, whether the facts before him place the given case under his cognizance, is as unreasonable as it is impolitic." And again: "Where the judge is called upon by the facts before him to decide whether his authority extends over the matter, such an act is a judicial one, and such officer is not liable in a suit to the person affected by his decision, whether such de-

cision be right or wrong; but when no facts are present, or only such facts as have neither legal value nor color of legal value in the affairs, then in that event for the magistrate to take jurisdiction is not in any manner the performance of a judicial act, but simply the commission of an official wrong. This criterion seems a reasonable one. It protects a judge against the consequences of every error of judgments, but it leaves him answerable for the commission of wrong that is practically willful. Such protection is necessary to the independence and usefulness of the judicial officer, and such responsibility is important to guard the citizen against official oppression."

In *Calhoun v. Little*, 106 Ga. 336, 32 S. E. 86, 43 L. R. A. 630, 71 Am. St. Rep. 254, the court held that a judicial officer of an inferior court was not liable in a civil action to the plaintiff for inflicting a punishment upon him under a void ordinance. In that case the court discusses the question of the distinction between the immunity of a judge of a superior and of an inferior court, and, after citing many cases herein referred to, as well as others, lays down this rule: "But all judicial officers stand upon the same footing and must be governed by the same rules. It follows from what has been said that where the court has jurisdiction of the subject-matter of the offense, and the presiding officer erroneously decides that the court has jurisdiction of the person committing it, or commits an act in excess of his jurisdiction, he will not be liable in a civil action for damages."

In *Henke v. McCord*, 55 Iowa, 378, 7 N. W. 623, it was decided that a justice of the peace, who enforces an ordinance which is void for want of power in the city to enact it, cannot be held liable therefor in a civil action for damages. In *Thompson v. Jackson*, 93 Iowa, 376, 61 N. W. 1004, 27 L. R. A. 92, it was decided that a justice of the peace, like judges of the superior courts, is protected from personal liability for judicial acts in excess of his jurisdiction, if he acted in good faith, believing that he had jurisdiction. The court there said: "The current of legal thought is that the distinction [between judges of superior and of inferior courts] is unreasonable, unjust, illogical, and ought not to obtain." In *Bell v. McKinney*, 63 Miss. 187, it was held that where a magistrate had authority to require a person brought before him to give bail for his appearance at a superior court, but, under an erroneous judgment as to the extent of his authority and in good faith, tried such person, and, upon his conviction, sentenced him to pay a fine or be imprisoned, the magistrate was held not liable in damages to the person aggrieved.

We are aware of some decisions wherein a different conclusion has been reached, of which, perhaps, *Piper v. Pearson*, 2 Gray (Mass.) 120, 61 Am. Dec. 438, may be a leading case; but we prefer the more liberal doctrine already stated, which is so abundantly supported by the authorities already referred to, as well as by others. The facts already stated bring the case of the judge who acted upon the original

complaints entirely within this doctrine of immunity from civil liability for judicial errors. He was the judge of the Augusta municipal court, a court of record, having original jurisdiction over all offenses of this character, the violation of city ordinances, within the limits of his territorial jurisdiction. His court had jurisdiction over the general subject-matter, as we have already defined that expression, and as it is defined in *Hunt v. Hunt*, 72 N. Y. 217, 28 Am. Rep. 129. As we have already seen, the city had express statutory authority to pass such an ordinance, and it had been duly passed by the city council and published among the ordinances of the city, although not published, as required by statute before taking effect, in a newspaper. The judge had every reason to believe that all of the preliminaries required by statute had been complied with, and had no knowledge or reason to suppose that this particular ordinance had not been published in a newspaper as required. There is no suggestion that he did not act in entire good faith in the premises. He therefore should not be held liable in damages to the plaintiff, whose rights were fully protected by the opportunity to appeal from an erroneous decision to an appellate court, where the error might be corrected.

Suppose this objection to the validity of the ordinance had been raised at the hearing, and the judge had then decided, although erroneously, that the ordinance as a matter of fact had been published as the statute required; it would hardly be claimed that he was liable because of this erroneous decision upon the question of fact. Or suppose, the point being made, he had decided as a matter of law, still erroneously, perhaps, that the statute was merely directory and that the ordinance was valid and effective, notwithstanding the fact that it never had been published in a newspaper; it could then hardly be claimed that he was liable in damages to a party aggrieved for his erroneous judicial decision of a question that arose and had to be passed upon by him in his judicial capacity during the course of the proceedings. He is not more liable, in our opinion, because of the fact that he had no knowledge of this failure as to one of the preliminary requisites, and because the point was not made at the hearing before him.

For these reasons, none of these defendants are liable, and the entry will be:

Judgment for defendants.

2. MINISTERIAL OFFICERS ⁴

BAIR v. STRUCK.

(Supreme Court of Montana, 1903. 29 Mont. 45, 74 Pac. 69, 63 L. R. A. 481.)

HOLLOWAY, J.⁵ This action was commenced by the plaintiff, Bair, to recover damages from the defendant for injury to personal property. The complaint alleges that in August, 1899, the plaintiff was the owner of 150 head of Merino bucks, which had lately been imported into this state from the state of Oregon; that the defendant was deputy sheep inspector for Yellowstone county, and as such took the sheep from the possession of the plaintiff, and subjected them to certain quarantine regulations; that none of the sheep were diseased; that the defendant wrongfully and negligently prepared the materials used for dipping the sheep, and put therein carbolic acid or other poisonous matters in such quantities that 69 head of said sheep were killed, and the remaining 81 so badly injured as to render them unfit for breeding purposes, for which they were purchased. The prayer of the complaint was for \$2,100 damages. The defendant admitted in his answer that he was deputy sheep inspector, and that as such he dipped the sheep in question on August 20, 1899, and denied the other material allegations of the complaint. By way of an affirmative defense the defendant alleged that the dipping of the sheep in question was done by him under and by virtue of a quarantine proclamation issued by the Governor of Montana on April 15, 1899. The cause was tried to a jury, which returned a verdict in favor of the plaintiff for \$1,055.50, and from the judgment entered for the amount of the verdict and costs, and from an order denying the defendant a new trial, these appeals are taken.

It is earnestly contended that the complaint shows on its face that in the discharge of his duties the defendant acted as a quasi judicial officer, and therefore is not liable for damages arising from his negligence, and would only be liable for such damages as were occasioned by his willful or wanton misconduct, and no such misconduct is alleged. Such portions of the Political Code as are applicable to the facts of this case read as follows:

"Sec. 3034. Whenever the Governor, by proclamation, quarantines [sheep] for inspection as provided in the next section any sheep brought into Montana, the deputy inspector of the county in which such sheep may come, must immediately inspect the same, and if he finds that they are infected with scab, or any other infectious disease, he must cause the same to be held within a certain limit or place in his

⁴ For discussion of principles, see Chapin on Torts, § 42.

⁵ A portion of the opinion is omitted.

said county, to be defined by him, until such disease has been eradicated, as provided in the next preceding section.

"Sec. 3035. Whenever the Governor has reason to believe that any disease mentioned by this article has become epidemic in certain localities in any other state or territory, or that conditions exist that render sheep likely to convey disease, he must thereupon by proclamation, designate such localities and prohibit the importation from them of any sheep into this state, except under such restrictions as he, after consultation with the veterinary surgeon, may deem proper."

Acting under the authority of these sections, the Governor of Montana, on April 15, 1899, issued a proclamation, the pertinent portions of which read as follows: "Whereas, I have reason to believe that conditions exist which render the class of sheep herein designated rams, or bucks, or stock sheep, when brought into this state, liable to convey the disease known as 'scab,' it is hereby ordered that all rams, or bucks, or stock sheep, imported into the state of Montana, from any other state or territory of the United States or foreign countries whatsoever, must when shipped be loaded at point of starting into properly disinfected car or cars, and shipped in such properly disinfected car or cars into this state, where, upon arrival at the state line of Montana, or the closest available point thereto where the sheep are to be unloaded to be driven to destination in the state, and before being turned upon the public domain or upon private premises, and all rams, bucks, or stock sheep driven into or through any portion of this state from any adjoining state or country, avoiding all quarantine yards and areas, shall be held at such point or points as may be hereinafter designated and there dipped under the supervision of the state veterinarian through the deputy sheep inspector of the county into which the sheep are to remain, and said sheep shall be dipped in some recognized and reliable dip known to be efficient in the cure of scab, twice, the second dip to occur within 10 days or between 10 and 12 days after the first dipping." Under the foregoing provisions it was made the duty of the Governor to determine what sheep, not themselves diseased, should be quarantined, and to prescribe the quarantine regulations. In doing so he doubtless acted in a quasi judicial capacity, and, having once determined that fact, and having prescribed such regulations in his proclamation, the only duty devolving upon the defendant was to carry such regulations into effect.

But it is contended that under the provisions of the Governor's proclamation—"said sheep shall be dipped in some recognized and reliable dip, known to be efficient in the cure of scab"—the defendant was called upon to exercise his judgment and discretion in determining the material to be used and the method of its application, and in this he acted in a quasi judicial capacity. With this contention we cannot agree. The law contemplates that only men who, by their skill and experience, are competent, shall be appointed such deputies, and invested with the duty of carrying into execution this police power of

the state. The mere fact that such officers are called upon to exercise some discretion or judgment in selecting materials to be used and the manner of their use does not change the character of their acts from ministerial to judicial or quasi judicial ones. Experience teaches that few, if any, ministerial officers are not called upon to exercise some judgment or discretion in the performance of their official duties. But, if the contention of the appellant be sustained, the distinction between ministerial and quasi judicial acts is practically abolished. As distinguishing between acts quasi judicial and acts ministerial in their character, the following definitions we think correctly state the law: "Quasi judicial functions are those which lie midway between the judicial and ministerial ones. The lines separating them from such as are thus on their two sides are necessarily indistinct; but, in general terms, when the law, in words or by implication, commits to any officer the duty of looking into facts, and acting upon them, not in a way which it specifically directs, but after a discretion in its nature judicial, the function is termed quasi judicial." Mechem on Public Officers, § 637; Bishop on Noncontract Law, §§ 785, 786. "Where a power rests in judgment or discretion, so that it is of a judicial nature or character, but does not involve the exercise of the functions of a judge, or is conferred upon an officer other than a judicial officer, the expression used is generally 'quasi judicial.' * * * The officer may not in strictness be a judge; still, if his powers are discretionary, to be exerted or withheld according to his own view of what is necessary and proper, they are in their nature judicial." Throop on Public Officers, § 534. "A ministerial act may perhaps be defined to be one which a person performs in a given state of facts, in a prescribed manner, in obedience to the mandate of legal authority, without regard to or the exercise of his own judgment upon the propriety of the act done." Id. § 537; *Flournoy v. Jeffersonville*, 17 Ind. 169, 79 Am. Dec. 468; *Pennington v. Streight*, 54 Ind. 376. " * * * In the same line, a ministerial act has also been defined as an act performed in a prescribed manner, in obedience to the law or the mandate of legal authority, without regard to, or the exercise of, the judgment of the individual upon the propriety of the acts being done." Mechem on Public Officers, § 657. An act is not necessarily taken out of the class styled "ministerial" because the officer performing it is nevertheless vested with a discretion respecting the means or the method to be employed. Such is not the judgment or discretion which is an essential element of judicial action. *McCord v. High*, 24 Iowa, 336; *Grider v. Tally*, 77 Ala. 422, 54 Am. Rep. 65; Mechem on Public Officers, § 658; *Ency. Law* (2d Ed.) 377.

The same doctrine is announced in *Hicks v. Dorn*, 42 N. Y. 47. In this case the plaintiff, Hicks, was the owner of a canal boat, and the defendant was the superintendent of repairs in charge of one section of the Erie Canal. Along this canal was a dry dock, into which plaintiff's boat had been taken for repairs. In May, 1865, there was a violent spring rain, which raised the water in the canal to such an extent

that in some places it ran over the banks, and it became necessary to open the waste gates connected with the dry dock to let off the surplus water. The captain commenced moving the boat into the canal, and when about half way through the gates in the canal, the water having run rapidly out of that compartment of the dry dock, the boat was left resting upon the sill of the waste gate, about one-half of the boat extending into the canal and the other half in the dry dock. In order to render the canal navigable, it became necessary to move the boat; and several methods for the accomplishment of this purpose were open to the superintendent, one of which was cutting up and removing the boat so as to close the gates, and this method he pursued as the most expeditious for accomplishing his purpose. An action having been brought against him by the owner of the boat, among other defenses set up was that in performing his duties the defendant had acted in a quasi judicial capacity, and could not be held liable except for wanton misconduct on his part. In disposing of this contention the court said: "It is claimed that the defendant, in determining to remove this boat, and in the removal of it, had a judicial discretion to exercise; and hence that he is not liable, in a civil action, for the manner in which he exercised this discretion. I am unable to see in what sense the defendant, as to this transaction, acted judicially. The law made it his duty to put this canal in repair, and it was not left to his discretion to determine whether he would discharge that duty or not. The law made it an imperative duty, and, if he had neglected to perform it, he would have been liable civilly for damages sustained by any person from his neglect of duty. In the discharge of this duty, thus imperatively imposed upon him by law, he acted ministerially. It is true that he was bound to exercise his discretion as to the methods and instrumentalities to be employed, and this is true of all ministerial officers; and yet it has never been held that, merely because ministerial officers have a discretion to exercise, that gives them the immunity of judicial officers. In this case, then, the defendant was bound to discharge his ministerial duties in a prudent, careful manner, without infringing upon the rights of private individuals, or unnecessarily injuring them, and for an improper discharge of his duty the law makes him liable to the individual injured."

The question involved in this controversy is not whether the policy adopted was wise, but whether a wrong was done in the details of its execution. We are of the opinion that in the discharge of his duty the defendant acted in a ministerial capacity only. * * *

PEOPLE v. WARREN.

(Supreme Court of New York, 1843. 5 Hill, 440.)

Certiorari to the Oneida general sessions, where the defendant was convicted of an assault and battery upon one Johnson, a constable. Johnson arrested the defendant on a warrant issued by the inspectors of election of the city of Utica for interrupting the proceedings at the election by disorderly conduct in the presence of the inspectors. 1 R. S. (1st Ed.) p. 137, § 37. The warrant was regular and sufficient upon its face. The defendant resisted the officer and for that assault he was indicted. The defendant offered to prove that he had not been in the presence or hearing of the inspectors at any time during the election and that *Johnson knew it*. The court excluded the evidence and the defendant was convicted. He now moved for a new trial on a bill of exceptions.

PER CURIAM. Although the inspectors had no jurisdiction of the subject matter, yet as the warrant was regular upon its face, it was sufficient authority for Johnson to make the arrest and the defendant had no right to resist the officer. The knowledge of the officer that the inspectors had no jurisdiction is not important. He must be governed and is protected by the process, and cannot be affected by anything which he has heard or learned out of it. There are some dicta the other way; but we have held on several occasions that the officer is protected by process regular and legal upon its face whatever he may have heard going to impeach it.

New trial denied.

II. Infants *

SLAYTON v. BARRY.

(Supreme Judicial Court of Massachusetts, 1900. 175 Mass. 513, 56 N. E. 574, 49 L. R. A. 560, 78 Am. St. Rep. 510.)

MORTON, J. The declaration in this case is in two counts. The second count is in trover for the goods described in the first count. The first count alleges, in substance, that the defendant, intending to defraud the plaintiff, deceitfully and fraudulently represented to him that he was of full age, and thereby induced the plaintiff to sell and deliver to him the goods described, and, though often requested, had refused to pay for or return the goods, but had delivered them to persons unknown to the plaintiff. The case is here on exceptions to the refusal of the presiding judge to give certain instructions requested by the plaintiff, and to his ruling ordering a verdict for the defendant. The question is whether the plaintiff can maintain his action. He could not bring an action of contract, and so has brought an action of tort. The precise question presented has never been passed upon by this court. *Merriam v. Cunningham*, 11 Cush. 40, 43. In other jurisdictions it has been decided differently by different courts. We think that the weight of authority is against the right to maintain the action. *Johnson v. Pie*, 1 Lev. 169, 1 Sid. 258, 1 Keb. 905; *Grove v. Nevill*, 1 Keb. 778; *Jennings v. Rundall*, 8 Term R. 335; *Green v. Greenbank*, 2 Marsh. 485; *Price v. Hewett*, 8 Exch. 146; *Wright v. Leonard*, 11 C. B. (N. S.) 258; *De Roo v. Foster*, 12 C. B. (N. S.) 272; *Gilson v. Spear*, 38 Vt. 311, 88 Am. Dec. 659; *Nash v. Jewett*, 61 Vt. 501, 18 Atl. 47, 4 L. R. A. 561, 15 Am. St. Rep. 931; *Ferguson v. Bobo*, 54 Miss. 121; *Brown v. Dunham*, 1 Root (Conn.) 272; *Geer v. Hovey*, Id. 179; *Wilt v. Welsh*, 6 Watts (Pa.) 9; *Burns v. Hill*, 19 Ga. 22; *Kilgore v. Jordan*, 17 Tex. 341; *Benj. Sales* (6th Ed.) 23; *Cooley, Torts* (2d Ed.) 126; 2 Add. Torts, § 1314. See, contra, *Fitts v. Hall*, 9 N. H. 441; *Eaton v. Hill*, 50 N. H. 235, 9 Am. Rep. 189; *Hall v. Butterfield*, 59 N. H. 354, 47 Am. Rep. 209; *Rice v. Boyer*, 108 Ind. 472, 9 N. E. 420, 58 Am. Rep. 53; *Wallace v. Morss*, 5 Hill (N. Y.) 391.

The general rule is, of course, that infants are liable for their torts. *Sikes v. Johnson*, 16 Mass. 389; *Homer v. Thwing*, 3 Pick. 492; *Shaw v. Coffin*, 58 Me. 254, 4 Am. Rep. 290; *Vasse v. Smith*, 6 Cranch, 226, 3 L. Ed. 207. But the rule is not an unlimited one. It is to be applied with due regard to the other equally well settled rule, that, with cer-

* For discussion of principles, see Chapin on Torts, § 43.

tain exceptions, they are not liable on their contracts; and the dominant consideration is not that of liability for their torts, but of protection from their contracts. The true rule seems to us to be as stated in *Association v. Fairhurst*, 9 Exch. 422, 429, where it was sought to hold a married woman for a fraudulent misrepresentation, namely: If the fraud "is directly connected with the contract, * * * and is the means of effecting it, and parcel of the same transaction," then the infant will not be liable in tort. The rule is stated in 2 Kent, Comm. (8th Ed.) § 241, as follows: "The fraudulent act, to charge him [the infant], must be wholly tortious; and a matter arising ex contractu, though injected with fraud, cannot be changed into a tort in order to charge the infant in trover or case by a change in the form of the action." In the present case it seems to us that the fraud on which the plaintiff relies was part and parcel of the contract, and directly connected with it. The plaintiff cannot maintain his action without showing that there was a contract, which he was induced to enter into by the defendant's fraudulent representations in regard to his capacity to contract, and that pursuant to that contract there was a sale and delivery of the goods in question. Whether, as an original proposition, it would be better if the rule were as laid down in *Fitts v. Hall*, supra, and *Hall v. Butterfield*, supra, in New Hampshire, and *Rice v. Boyer*, supra, in Indiana, we need not consider. The plaintiff relies on *Homer v. Thwing*, supra; *Badger v. Phinney*, 15 Mass. 359, 8 Am. Dec. 105; and *Walker v. Davis*, 1 Gray, 506. In *Walker v. Davis*, supra, there was no completed contract, and the title did not pass. The sale of the cow by the defendant operated, therefore, clearly, as a conversion. *Badger v. Phinney*, supra, was an action of replevin; and it was held that the property had not passed, or if it had, that it had revested in the plaintiff in consequence of the defendant's fraud. The plaintiff maintained his action independently of the contract. In *Homer v. Thwing*, supra, the tort was only incidentally connected with the contract of hiring. We think that the exceptions should be overruled. So ordered.

III. Servants and Agents⁷

VAN ANTWERP v. LINTON.

(Supreme Court of New York, General Term, First Department, 1895. 89 Hun, 417, 35 N. Y. Supp. 318, affirmed 157 N. Y. 716, 53 N. E. 1133.)

PARKER, J. This appeal brings up a judgment entered on the dismissal of the complaint after the opening address to the jury by plaintiff's counsel, which was taken down. From the complaint and opening, it appears that the plaintiff was injured by the fall of the grand stand at the Yale-Princeton football game on Thanksgiving Day, 1890, on grounds in possession of the Brooklyn's Limited, a corporation organized under the laws of the state of New York. The action was brought against the Brooklyn's Limited and Messrs. Linton, Chauncey, and Wallace, who were appointed a committee of the board of directors of the Brooklyn's Limited, to put the grounds in condition for the exhibition of the game. The Brooklyn's Limited made default, and the question presented to the trial court, upon the motion to dismiss the complaint, was whether, from the complaint and opening, a cause of action against the individual defendants was stated. It was conceded that the individual defendants did not have any lease from the Brooklyn's Limited, nor any one else, running to them; and the sole ground upon which the plaintiff sought to charge them with liability was that they were appointed a committee by the directors of the corporation to erect a stand, and otherwise provide for the reception and convenience of the public, and that by reason of their negligent omission of duty there was a defective construction of the stand, which led to its falling, resulting in injury to the plaintiff. As it was conceded that the Brooklyn's Limited was a domestic corporation duly organized under the laws of this state, and in possession of the premises when the stand was erected, and also at the time of the accident, liability against the individual defendants could not be predicated upon their being directors, officers, or stockholders in such corporation. *Demarest v. Flack*, 128 N. Y. 205, 28 N. E. 645, 13 L. R. A. 854. That they were the agents of the corporation in directing and superintending the erection of the stand was assumed by the learned trial judge, as he was bound to do, upon the complaint and opening; and he reached the conclusion that the acts with which they were charged constituted nonfeasance, and not misfeasance. If he was right in such respect, it is conceded that the complaint was properly dismissed; for, whatever may be the rule in other jurisdictions, it is conceded that in this state an agent or servant is not liable to third persons for non-

⁷ For discussion of principles, see Chapin on Torts, § 46.

feasance. As between himself and his master, he is bound to serve him with fidelity; and for a breach of his duty he becomes liable to the master, who, in turn, may be charged in damages for injuries to third persons occasioned by the nonfeasance of the servant. For misfeasance the agent is generally liable to third parties suffering thereby. The distinction between nonfeasance and misfeasance has been expressed by the courts of this state as follows: "If the duty omitted by the agent or servant devolved upon him purely from his agency or employment, his omission is only of a duty he owes his principal or master, and the master alone is liable; while, if the duty rests upon him in his individual character, and was one that the law imposed upon him independently of his agency or employment, then he is liable."

Appellant urges that although these individual defendants were charged by the corporation with the duty of erecting this stand, and the acts complained of consisted in omitting to provide for a construction of sufficient strength to withstand the strain to which it was subjected, nevertheless they were guilty of misfeasance, rather than nonfeasance. With commendable diligence, he has brought to our attention authorities in other jurisdictions tending to support his contention; but we refrain from their consideration, because it is our understanding that the courts of this state have determined otherwise. In *Murray v. Usher*, 117 N. Y. 542, 23 N. E. 564, the plaintiff, while employed upon a platform in a sawmill belonging to two of the defendants, sustained injuries, by reason of its falling, which occasioned his death. His administrator brought an action against the owners of the mill and one Lewis, who was their superintendent having general charge of the business, and being specially instructed to look after the necessary repairs, which included the duty of inspecting the platform from time to time to see that it was kept in a safe condition. Judgment was recovered against all of the defendants. In the court of appeals the question of the superintendent's liability was considered; the court holding that the omission of the superintendent to perform the duty devolving upon him constituted nonfeasance, for which he was not liable in a civil action, but that his employers were. That case, it will be observed, is directly in point with the one under consideration. Lewis, the superintendent, neglected to perform the duty which his employers had devolved upon him, and such neglect led to the fall of the platform, which caused plaintiff's injury. In this case the defendants were engaged in superintending the erection of the stand. As more than one was charged with such duty, they were called a committee. But when the duties devolved upon them were of the same general character as in *Murray's Case*, and the charge is that the fall of the stand was due to their neglect to properly discharge the obligations put upon them by the corporation. In *Burns v. Pethcal*, 75 Hun, 437, 27 N. Y. Supp. 499, an attempt was made to recover of a foreman for the loss of the life of an employ  , due, it was charged, to the

omission of the foreman to warn the dead man of the danger of working in a particular place. There was a recovery at the circuit, but the general term reversed the judgment; holding that a servant is not liable jointly with his master, where the negligence of the servant consists of an omission of a duty devolved upon him by his employment, although he may be liable where he omits to perform a duty which rests upon him in his individual character, and one which the law imposes upon him independently of his employment. These cases fully sustain the decision of the trial court. The judgment should be affirmed, with costs.

VAN BRUNT, P. J., concurs. FOLLETT, J., dissents.

LOUGH v. JOHN DAVIS & CO.

(Supreme Court of Washington, 1902. 30 Wash. 204, 70 Pac. 491, 59 L. R. A. 802, 94 Am. St. Rep. 848.)

DUNBAR, J.⁸ This is an action against an agent, who was authorized to rent and repair the tenement house described in the complaint, for permitting the house to become unsafe for want of repairs, from which cause the plaintiff was injured. Paragraph 2 of the complaint is as follows: "That at all said times, and for a long time before, the above-named defendant, Sheldon R. Webb, has been and still is the owner of that certain real property known as lots 8 and 9, in block 38, of A. A. Denny's addition to the city of Seattle, and of the buildings thereon situated, and that the above-named defendant John Davis & Co. has had, and still has, sole and absolute control and management of said real property as the servant and agent of said Sheldon R. Webb, with full power, authority, and direction from their said principal to rent and repair the same, and to keep the same in repair and safe condition for tenants." The other pertinent allegations are to the effect that a wide veranda, extending along two sides of the building about 15 feet from the ground, was used in common by all of the tenants, and was inclosed by a railing; that the railing was allowed to become old, rotten, and unsafe through the negligence of the defendants, and that, while the plaintiff was playing on said veranda, by reason of the unsafe condition, the railing gave way, and she fell from said veranda from a height of 15 feet and more from the ground, and was injured, etc. To this complaint the defendant John Davis & Co. interposed a demurrer on the ground that it did not state facts sufficient to constitute a cause of action against it, the demurring defendant. There was no appearance by Sheldon R. Webb. The demurrer was sustained, and the plaintiff electing to stand on her complaint, judgment was entered on the demurrer. From such judgment sustaining the demurrer this appeal was taken. * * *

⁸ A portion of the opinion is omitted.

It is the contention of the respondent that the law is well settled that for a misfeasance the agent is personally liable, but that he is never liable for a mere nonfeasance; and that, the respondent being charged only with a nonfeasance or neglect to do its duty, and not with any misfeasance or act which it ought not to do, the complaint on its face shows that it is not liable, and that the demurrer was therefore properly sustained. This rule is announced by some of the law writers and many of the courts. One of the leading cases sustaining this doctrine is *Delaney v. Rochereau*, 34 La. Ann. 1123, 44 Am. Rep. 456, where it was held that under the doctrine of both the common and civil law agents are not liable to third persons for nonfeasance or mere omissions of duty, being responsible to such parties only for the actual commission of those positive wrongs for which they would be otherwise accountable in their individual capacity under obligations common to all men. In this case a balcony which needed repairs fell, fatally injuring the plaintiff; and, while the agent was not responsible for the injured party's being in the house at that particular time,—he having obtained entrance by means of a key obtained from some one else,—the case is discussed and the judgment based upon the doctrine above announced. This is also the established doctrine in New York. The case of *Carey v. Rochereau* (C. C.) 16 Fed. 87, is a Louisiana case, and bases its decision on *Delaney v. Rochereau*, *supra*, without discussion. *Labadie v. Hawley*, 61 Tex. 177, 48 Am. Rep. 278, held, in accordance with the same rule, that an agent renting his principal's house with authority to construct a cooking range was not liable for injury to an adjoining proprietor, caused by the use of the range; citing *Story*, Ag. 309, and other authorities. In *Feltus v. Swan*, 62 Miss. 415, it was held that an agent in charge of a plantation was not liable to the owner of an adjoining plantation for damage resulting from the malicious neglect and refusal of the agent to keep open a drain which it was his duty as such agent to keep open. The announcement of this doctrine is accredited by many of the courts indorsing it to the opinion in *Lane v. Cotton*, 12 Mod. 472, but it was, as a matter of fact, announced only incidentally in that case in a dissenting opinion. The question of the responsibility of the agent could not have been before that court, for the action was against a postmaster for the loss of a letter which was taken from the mail by a clerk, and it was only the responsibility of the master, and not that of the servant or agent, which was under discussion. The reason assigned to sustain this rule is that the responsibility must arise from some express or implied obligations between the particular parties standing in privity of law or contract with each other. If this be true, it is difficult to see what difference there is in the obligation to their principal between the commission of an act by the agents which they are bound to their principal not to do and the omission of an act which they have obligated themselves to their principal to do. They certainly stand in

privity of law or contract with their principal exactly as much in the one instance as in the other, for the obligation to do what ought to be done is no more strongly implied in the ordinary contract of agency than is the obligation not to do what ought not to be done. This reason for the rule not being tenable, and no other reason being obvious, the rule itself ought not to obtain; for jurisprudence does not concern itself with such attenuated refinements. It rests upon broad and comprehensive principles in its attempt to promote rights and redress wrongs. If it takes note of a distinction, such distinction will be a practical one, founded on a difference in principle, and not a distinction without a difference; and there can be no distinction in principle between the acts of a servant who puts in motion an agency which, in its wrongful operation, injures his neighbor, and the acts of a servant who, when he sees such agency in motion, and when it is his duty to control it, negligently refuses to do his duty, and suffers it to operate to the damage of another. There is certainly no difference in moral responsibility, there should be none in legal responsibility. Of course, if the omission of the act or the nonfeasance does not involve a non-performance of duty, then the responsibility would not attach. If it does involve a non-performance of duty to such an extent that the agent is liable to the principal for the damages ensuing from his neglect, there is no hardship in compelling him to respond directly to the injured party. Such practice is less circuitous than that which necessitates first the suing of the master by the party injured, and then a suit by the master against the servant to recoup the damages.

But the honorable judge who wrote the opinion in *Delaney v. Rochereau*, supra, was mistaken in his announcement that the civil law indorsed the distinction upon which his decision was based, for, while the doctrine is stated in the Justinian Code that no man could usually be made liable for a mere omission to act, it was otherwise when the omission to act involved a negligence of duty. Domat argues that, as an agent is at liberty not to accept the order and power which are given him, so he is bound, if he does accept the order, to execute it; and, if he fail to do so, he will be liable for the damages which he shall have occasioned by his not acting. Under the Aquilian law the distinction between omission and commission was not recognized under such circumstances. In the ninth Digest of the Aquilian law the following instance is given: One servant lights a fire, and leaves it to another. The latter neglects to check the fire at the proper time and place, and a villa is burned. The first servant was charged with no negligence, because it was his duty to light the fire, and it is argued, very sensibly, that, if the second could not be charged because not putting out the fire was simply an omission of duty, there would be a miscarriage of justice. Is the keeper of a drawbridge, whose duty it is to close the draw after a ship passes through, and who negligently fails to perform that duty, allowing a car loaded with passengers to

be hurled into the river below, to escape responsibility to the injured, while the man who attempts to operate it, but, in so attempting, operates it negligently and unskillfully, is held responsible? Instances in the ordinary transactions of life might be multiplied almost without end, the very statement of which shows conclusively the fallacy of the rule.

The attempt by the courts to maintain this indistinguishable distinction has led to many inconsistent decisions. Thus, in *Albro v. Jaquith*, 4 Gray (Mass.) 99, 64 Am. Dec. 56, the plaintiff was not allowed to recover of the superintendent of a canal company for damages caused by negligence in the management of the apparatus used for the purpose of generating, containing, and burning inflammable gas; the superintendent being the agent of the company, and being charged with carelessly, negligently, and unskillfully managing the business. It was held that he was not charged with any direct act of misfeasance, but only with nonfeasance, and that there was no redress, because, as the court said, the obligation to be faithful and diligent was founded in an express contract with his principal. As we have before indicated, this would be equally true of the acts of commission or misfeasance in his stewardship. But in *Bell v. Josselyn*, 3 Gray, 309, 63 Am. Dec. 741—also a Massachusetts case, and decided the same year—it was held that an agent who negligently directed water to be admitted to a water pipe was liable to a third person, because such action was misfeasance. In that case it was not claimed that the admission of water to the pipe was negligent or wrongful, but the negligent act or omission was in allowing the pipe to become obstructed—certainly as pure an omission or nonfeasance as could be conceived of. But the court, in order to maintain the distinction which it deemed itself bound by precedent to do, virtually obliterated the distinction by the following circuitous reasoning: "The defendant's omission to examine the state of the pipes in the house before causing the water to be let on was a nonfeasance. But if he had not caused the water to be let on, that nonfeasance would not have injured the plaintiff. If he had examined the pipes, and left them in a proper condition, and then caused the letting on of the water, there would have been neither nonfeasance nor misfeasance. As the facts are, the nonfeasance caused the act done to be a misfeasance. But from which did the plaintiff suffer? Clearly, from the act done, which was not less a misfeasance by reason of it being preceded by a nonfeasance." Much more cogent and judicial is the reasoning of the same court many years after in *Osborne v. Morgan*, 130 Mass. 102, 39 Am. Rep. 437, where an agent of premises was held responsible to a third person for suffering to remain suspended from a room a tackle block, which fell upon and injured the plaintiff. The court, speaking through Chief Justice Gray, said: "The principal reason assigned was that no misfeasance or positive act of

wrong was charged, and that for nonfeasance,—which was merely negligence in the performance of a duty arising from some express or implied contract with his principal or employer,—an agent or servant was responsible to him only, and not to any third person. It is often said in the books that an agent is responsible to third persons for misfeasance only, and not for nonfeasance. And it is doubtless true that, if an agent never does anything towards carrying out his contract with his principal, but wholly omits and neglects to do so, the principal is the only person who can maintain any action against him for the nonfeasance. But if the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts; and he cannot, by abandoning its execution midway, and leaving things in a dangerous condition, exempt himself from liability to any person who suffers injury by reason of his having so left them without proper safeguards. This is not nonfeasance, or doing nothing; but it is misfeasance, doing improperly.” There is still another class of cases which hold what seems to us to be the correct doctrine, viz., that the obligation, whether for misfeasance or nonfeasance, does not rest in contract at all, but is a common-law obligation devolving upon every responsible person to so use that which he controls as not to injure another, whether he is in the operation of his own property as principal or in the operation of the property of another as agent. One of the leading cases maintaining this view is *Baird v. Shipman*, a case decided in 1890, and reported in 132 Ill. 16, 23 N. E. 384, 7 L. R. A. 128, 22 Am. St. Rep. 504. There it was held that an agent who has complete control of a house belonging to an absent principal, and who lets the house in a dangerous condition, promising to repair it, is responsible to the third person injured by an accident caused by want of such repair. There is nothing to distinguish this case from the case at bar excepting the promise to repair, and that does not seem to have been deemed by the court an important feature; but the case was decided upon the broad principle above announced. Said the court: “It is not his contract with the principal which exposes him to or protects him from liability to third persons, but his common-law obligation to so use that which he controls as not to injure another. That obligation is neither increased nor diminished by his entrance upon the duties of agency, nor can its breach be excused by the plea that his principal is chargeable. If the agent once actually undertakes and enters upon the execution of a particular work, it is his duty to use reasonable care in the manner of executing it, so as not to cause any injury to third persons which may be the natural consequence of his acts”—citing approvingly *Osborne v. Morgan*, *supra*. * * *

There is some contention in respondent's brief on the alleged barrenness of the allegations of the complaint, but we think the allega-

tions were ample to show that the respondent was authorized to keep the building in repair; that it undertook that office or duty, and was in complete control of the work. It is alleged that it was in absolute control and management, with full power, authority, and direction to repair, and to allege that it agreed to do so would only be to allege the agreement to do the duty which the law imposed upon it after it had assumed the control and management which is alleged.

Our conclusion is that the complaint states a cause of action against the respondent. The judgment is therefore reversed, with instructions to the lower court to overrule the demurrer to the complaint.

REAVIS, C. J., and ANDERS, MOUNT, and FULLERTON, JJ., concur.

PARTIES (Continued)

I. Corporations

1. MUNICIPAL¹

EDDY v. VILLAGE OF ELLICOTTVILLE.

(Supreme Court of New York, Appellate Division, Fourth Department, 1898.
35 App. Div. 256, 54 N. Y. Supp. 800.)

ADAMS, J. The facts of this case, succinctly stated, are as follows, viz.:

The defendant is a municipal corporation, created under the provisions of the general act of 1870 relative to the incorporation of villages (chapter 291) and the acts amendatory thereof. In virtue of the authority and power conferred upon it by the provisions of that act, it is alleged, and not denied, that "the defendant kept, maintained, possessed, and controlled a village lockup, situate on the public square in said village of Ellicottville, in which the defendant and its police officers regularly confined, and caused and suffered to be incarcerated and confined therein, persons who were from time to time arrested for violations of the ordinances of said defendant and of the criminal laws of this state." It appears that in the evening of February 17, 1897, the plaintiff's husband and intestate was arrested by one of the defendant's peace officers for intoxication, and confined in the lockup for the entire night; that while thus confined he contracted a severe cold, which terminated in pneumonia, from which disease he died in about one week thereafter. It further appears that at the time the plaintiff's intestate was thus imprisoned the lockup was, and for a considerable period prior thereto had been, in a dilapidated condition; that many of the windows thereof were broken; that the room in which the intestate was confined was not warmed; that he was consequently exposed to cold weather and draughts, which came in through the broken windows, and was compelled to pass the night without any suitable protection therefrom; and that, as a result of such exposure, he contracted the disease which terminated his life.

The foregoing facts are all alleged in the complaint, and, inasmuch as the complaint was dismissed upon the opening of the plaintiff's counsel, they must, for the purposes of this review, be accepted as the truth of the case. *Kennedy v. Mayor, etc.*, 73 N. Y. 365, 29 Am. Rep. 169.

The main question, therefore, which we are called upon to decide,

¹ For discussion of principles, see Chapin on Torts, § 51 (A).

is whether, assuming these facts to be true, they constitute a cause of action against this defendant; or, in other words, whether the defendant, a municipal corporation, is, in the circumstances of this case, liable for a negligent omission of duty which it is admitted caused the death of the plaintiff's intestate.

As introductory to a consideration of this question, it will be desirable, we think, to understand precisely what rights and liabilities attached to the defendant when, availing itself of the provisions of the act of 1870, it acquired corporate existence. A municipality, although a political division of the state, possesses two separate and distinct powers, one of which may be termed governmental or public, and the other private or corporate. *Hill v. City of Boston*, 122 Mass. 344, 23 Am. Rep. 332; *Lloyd v. City of New York*, 5 N. Y. 369, 55 Am. Dec. 347. In the exercise of the first of these powers the city or village is invested with the quality of sovereignty, while in the exercise of the second it occupies the same relation to the individual that any other corporate body does. Obviously, therefore, it is of the first importance that the true line of demarkation between these two powers should be ascertained, in order that it may be determined under which class or division the present case falls, for, if the duty of maintaining a village lockup or jail in a safe and healthful condition is a corporate one—that is, if it is one which falls within the second definition of municipal powers—then clearly the defendant is liable in a civil action to any individual who may have suffered damage in consequence of its omission to perform that duty; whereas, if the duty is purely public or governmental in its character, it is equally clear that no liability for a like omission would attach. *Reynolds v. Board*, 33 App. Div. 88, 53 N. Y. Supp. 75. The ascertainment of this dividing line is a problem which in many instances may prove somewhat difficult of solution, but, as was said in the case last cited, “when that line is ascertained it is not difficult to determine the rights of the parties, for the rules of law are clear and explicit which establish the rights, immunities, and liabilities of the (municipality) when in the exercise of each class of powers.” It is not contended, as we understand it, that the defendant is responsible by reason of any statutory requirement that it shall keep the building in question in a safe and healthful condition, and it necessarily follows that, if any liability whatever attaches for an omission of duty in that regard, it is simply an implied one.

Now, the basis of an implied municipal liability for negligence is either an obligation which rests upon the municipality in respect of its special or local interests, or else it is one under which it voluntarily assumes an undertaking from which it derives some benefit or advantage, or for which it expects to receive a consideration. *Dill. Mun. Corp.* (4th Ed.) §§ 980, 981. To illustrate: It was held, in a very early case, that a municipal corporation was responsible for the negligence and unskillfulness of its agents and servants in the construc-

tion of a dam on the Croton river; it appearing that the dam was a part of the work undertaken pursuant to an act of the legislature by which the city was supplied with water. *Bailey v. Mayor, etc.*, 3 Hill, 531, 38 Am. Dec. 669; *New York v. Bailey*, 2 Denio, 433. More recently such a corporation was adjudged liable to an individual for damage to his lands resulting from the omission of the city to keep its sewers in a proper state of repair. *Lloyd v. City of New York*, supra; *Barton v. City of Syracuse*, 36 N. Y. 54. In still another case, where a municipal corporation was charged with the duty of properly maintaining a dock, from which presumably it derived some profit or advantage, it was held liable for damage to a third party resulting from a negligent omission of that duty. *Kennedy v. Mayor, etc.*, supra. And this court has very recently held that a county which owned and conducted a farm in connection with, and for the benefit of, certain charitable and penal institutions, was liable to an adjoining owner for injuries to his premises resulting from the pollution of a stream of water passing over the same. *Lefrois v. Monroe Co.*, 24 App. Div. 421, 48 N. Y. Supp. 519.²

Many other like cases might be cited which would furnish ample illustration of the distinction which the law makes between a power which is sovereign and one which is simply corporate. It would seem, however, that those to which reference has already been made demonstrate quite clearly that the maintaining of a village jail in a safe and healthful condition is an act which does not properly fall within the second class of municipal powers, as hereinbefore defined; and consequently it only remains to be determined whether or not such an act may be termed a governmental power.

Inherently, as well as by legislative enactment, the defendant, as one of the political divisions of the state, is invested with certain police powers, by the exercise of which, through its police officers, it is authorized and enabled to protect the lives and property of its citizens. *City of Rochester v. West*, 29 App. Div. 125, 51 N. Y. Supp. 482. Among the powers thus conferred is that of arresting the violators of the law, and this, of course, includes the power to imprison; for it would be useless to arrest such offenders if no place were provided in which to confine them while undergoing punishment. If, then, in the exercise of this power, the defendant caused the intestate to be arrested, it will hardly be contended, we assume, that the village would have been liable for any injury which might have resulted to such intestate by reason of the negligent or unskillful conduct of the officer who, in the performance of his duty, caused the arrest to be made. And it seems equally clear that, within well-settled principles, no liability would have attached to the village by reason of the failure of the officer in charge of the jail to provide the intestate with such things as were essential to his health and comfort while he was undergoing con-

² Reversed on appeal, 162 N. Y. 563, 57 N. E. 185, 50 L. R. A. 206 (1900).

finement in that institution. *Maxmilian v. City of New York*, 62 N. Y. 160, 20 Am. Rep. 468. If this be conceded, as we think it must be, it is difficult to assign any sufficient reason for holding the defendant liable for its omission to keep its jail or lockup in suitable condition; for this is a duty which it is called upon to perform only in its public or governmental capacity, and it is also one the performance of which is, of necessity, committed to the police officers of the municipality. *Lorillard v. Town of Monroe*, 11 N. Y. 392-394, 62 Am. Dec. 120.

We have been unable to find any case arising in this state in which the precise question which is here presented has received adjudication, and there is much conflict of authority in the decisions of other states bearing upon that question. In one case, quite similar in some of its features to the one under consideration, the supreme court of North Carolina held that a municipality was liable for the death of a person confined in the city prison, the jury having found that his death was "accelerated by the noxious air of the guardhouse" (*Lewis v. City of Raleigh*, 77 N. C. 229); and this doctrine was followed more recently by the same court in another case arising out of a state of facts even more strikingly like those alleged in the complaint herein (*Shields v. Town of Durham*, 116 N. C. 394, 21 S. E. 402); while in *Edwards v. Pocahontas* (C. C.) 47 Fed. 268, the court, after alluding to the distinction between counties and municipal corporations proper, says that if a municipality, having power to maintain a jail, although not required to do so, undertakes to exercise the power, it will be liable for the negligent exercise of it in keeping the jail in such a filthy and unfit condition that the health of a prisoner is injured thereby.

It seems to be universally conceded that a county, by reason of the fact that it is a political division of the state, created for convenience, is under no liability in respect of torts, except as the same is imposed by statute; and for the same reason it is stated by an eminent text writer: "Such organizations as townships, school districts, road districts, and the like, though possessing corporate capacity and power to levy taxes and raise money for their respective public purposes, have been very generally considered not to be liable in case, or other form of civil action, for neglect of public duty, unless such liability be created by statute." And he adds: "A county, though it has power to erect and repair public buildings, and to levy and collect a tax for that purpose, is not responsible, in the absence of a statute making it so, for injuries resulting from the unsafe and dangerous condition of county buildings." *Dill. Mun. Corp.* (4th Ed.) § 963. In our opinion, the village of Ellicottville is as much a political division of the state as is the county in which it is located; and, this being the case, no reason suggests itself to our mind why, in circumstances like those disclosed by the record in this case, it should be subject to any other or different rule of liability for the omission of a public

duty. That this view of the matter is not without substantial support can be readily demonstrated by reference to adjudications which are certainly entitled to as much weight and consideration as those already cited. In *Blake v. City of Pontiac*, 49 Ill. App. 543, it was held that the keeping of a city jail is an act which the city is empowered to do only in its public capacity; that the same is within the police power of the city; and that consequently the city is not responsible for the wrongful acts of its agents in omitting to properly maintain that institution. In another case, arising in the same state, where it was charged that the defendant had created and maintained a "noisome, unhealthy, and uncomfortable prison," it was said by the court that "while the trustees and other officers might, by illegal and unwarranted exercise of power, render themselves individually liable, that would not render the town liable." *Town of Odell v. Schröder*, 58 Ill. 353. So, too, in the states of West Virginia, Minnesota, and Kansas, it has been held that the duty and function of keeping a jail are plainly and properly governmental in character, and fall within the rule that municipal corporations are not liable for acts done and powers exercised in that capacity. *Brown's Adm'r v. Town of Guyandotte*, 34 W. Va. 299, 12 S. E. 707, 11 L. R. A. 121; *Gullikson v. McDonald*, 62 Minn. 278, 64 N. W. 812; *La Clef v. City of Concordia*, 41 Kan. 323, 21 Pac. 272, 13 Am. St. Rep. 285; *City of New Kiowa v. Craven*, 46 Kan. 114, 26 Pac. 426. These cases are all directly in point, and they are in perfect accord with the views to which we have given expression, as well as with the principle which we are satisfied ought to be applied to the present case, and which, when applied, necessarily leads to an affirmance of the judgment appealed from.

Judgment affirmed, with costs. All concur.

2. CHARITABLE^{*}

DOWNES v. HARPER HOSPITAL.

(Supreme Court of Michigan, 1894. 101 Mich. 555, 60 N. W. 42, 25 L. R. A. 602, 45 Am. St. Rep. 427.)

GRANT, J. Plaintiff's decedent and husband became insane from disease, and, by advice of his physician, was conveyed to Harper Hospital. He was violent, and was confined in a room in the third story of the building, which was especially arranged for such patients, having a framework of iron over the windows. The deceased wrenched this iron framework off, jumped from the window, and was killed. Plain-

^{*} For discussion of principles, see Chapin on Torts, § 51 (B.)

tiff brings this suit to recover damages for the benefit of herself and children, alleging negligence on the part of the defendant. Defendant is a body corporate organized under Act No. 242, Laws 1863, entitled "An act for the incorporation of hospitals or asylums in cases where valuable grants or emoluments have been made to trustees for such purposes," and, at the time the alleged right of action is said to have accrued, was engaged in maintaining at Detroit the hospital commonly known as "Harper Hospital." In the declaration it is alleged that on or about January 26, 1890, Downs was ill, and was so disordered in mind from the effects of disease and pain that he became and was temporarily insane, violent, and dangerous, so that it became necessary to place him under restraint and skillful medical treatment to prevent him from harming himself and others, and to effect his cure; that the defendant, at the request of plaintiff, and well knowing Downs' mental and physical condition, received him into Harper Hospital as a patient, and, in consideration of the payment of \$2 per day, agreed to give Downs proper medical treatment, and to keep and restrain him so that he should suffer no bodily injury which he might inflict upon himself, and to have the room in which he was confined secure, with a proper and sufficient guard, framework, or other suitable protection over the window of such room, and so securely fastened that Downs, when confined in the room, would not be able to tear away the framework or grating over the window and throw himself therefrom, and to keep him properly handcuffed, so that he could not injure himself by tearing away the framework or bars over the window, or by throwing himself out of the window, and also to keep some suitable person constantly in attendance upon him. It is further alleged that the defendant, in disregard of its alleged duties and obligations, wrongfully, carelessly, and negligently failed to safely keep and care for and give medical attendance to Downs, and so keep and restrain him that his body should suffer no injury, and his life should be preserved from injury which he might produce by his own conduct and actions; that the defendant did not have the room where Downs was confined secure, and with a proper and sufficient guard, framework, or other suitable protection over the window, and so securely fastened that Downs, when confined in the room, could not tear away the framework or grating over the window, and throw himself therefrom; that the defendant did not keep Downs properly handcuffed, so that he could not do himself injury by tearing away the framework or bars and throwing himself out of the window, and did not keep some suitable person constantly in attendance upon him. It is further alleged that the defendant, well knowing Downs' mental and physical condition, and that he was temporarily insane, violent, and liable to injure himself and others, and to throw himself from the window of the room where he was confined, removed the handcuffs from Downs' wrists, placed him,

alone and unattended, in the padded room of the hospital, where insane persons are usually placed, and did not have the grating or framework over the window of such room properly constructed or properly secured and fastened, and that such framework or grating was made and fastened in such an insecure, unsafe, careless, and negligent manner that Downs, while insane, pulled down the ironwork and grating from the window, and threw himself therefrom, falling a distance of about 35 feet to the pavement, thereby receiving such injuries as to cause his death on January 29, 1890. At the conclusion of the evidence the court directed a verdict for the defendant, for the reason that the defendant was a charity which could not be made liable for a tort.

The organization of the defendant had its origin in two deeds—one executed February 3, 1859, by Walter Harper, and the other by Ann Martin, March 10th, the same year. The lands therein described were conveyed to seven prominent citizens of Detroit in trust for the founding of a hospital. The purpose was stated in the deed by Mr. Harper to be "the institution, erection, and maintenance of a hospital in the city of Detroit, or in the immediate vicinity thereof, for the succor, care, and relief of such aged, sick, and poor persons who shall apply for the benefit of the same, and who shall seem to my trustees hereof to be proper subjects of such aid as their means will enable them to afford." The particular scheme for founding the hospital, and all the details, were left to be devised and controlled by the trustees. It also provided for organizing and permanently maintaining a school for the instruction of youth in the different arts and trades, after the manner of what is known in Prussia as the "Flintenberg School." The deeds also provided that, if the legislature should enact a law enabling a corporation to be formed for the purposes named in them, the trustees might convey all the lands and funds to a corporation formed therefor. The trust was accepted by the trustees, and under the law above referred to the trustees conveyed the property to the defendant, a corporation, May 17, 1863. Other bequests have been made to the defendant for the same purpose, which in one year amounted to over \$100,000. The corporators receive no compensation or dividends. It is purely an eleemosynary institution, organized and maintained for no private gain, but for the proper care and medical treatment of the sick. Hospital physicians and attendants are, and of course must be, paid. The receipts have not always been sufficient to meet ordinary expenses, and one year a private citizen gave \$1,000 towards the deficiency. The law under which the defendant is organized recognizes it as a charity; exempts its property from taxation; provides that its funds shall be used faithfully and exclusively for the purposes of its organization, and that it may receive, by gift, grant, or devise, any property, but only for the purpose for which it is incorporated. It has no shares, and

is not a stock corporation. If the contention of the learned counsel for the plaintiff be true, it follows that the charity or trust fund must be used to compensate injured parties for the negligence of the trustees, or architects and builders, upon whose judgment reliance is placed as to plans and strength of materials; of physicians employed to treat patients; and of nurses and attendants. In this way the trust fund might be entirely destroyed, and diverted from the purpose for which the donor gave it. Charitable bequests cannot be thus thwarted by negligence for which the donor is in no manner responsible. If, in the proper execution of the trust, a trustee or an employé commits an act of negligence, he may be held responsible for his negligent act; but the law jealously guards the charitable trust fund, and does not permit it to be frittered away by the negligent acts of those employed in its execution. The trustees of this fund could not by their own direct act divert it from the purpose for which it was given, or for which the act of the legislature authorized the title to be vested in the defendant. It certainly follows that the fund cannot be indirectly diverted by the tortious or negligent acts of the managers of the fund, or their employés, though such acts result in damage to an innocent beneficiary. Those voluntarily accepting the benefit of the charity accept it upon this condition.

The fact that patients who are able to pay are required to do so does not deprive the defendant of its eleemosynary character, nor permit a recovery for damages on account of the existence of contract relations. The amounts thus received are not for private gain, but contribute to the more effectual accomplishment of the purpose for which the charity was founded. The wrongdoer, in a case of injury, but not the trust fund, must respond in damages. This proposition seems too clear to require argument or authority. It is not, however, inappropriate to remark that better facilities for the care, cure, and treatment of the sick, both of the poor, and of those who are able to pay, are secured by the establishment of hospitals like that of the defendant. These facilities are increased by the receipt of money from those who are able to pay in whole or in part for the benefits received. Several hospitals of this character exist in this state, founded by private munificence. Obviously, they would not have been founded if their donors had known, or ever supposed, that their charitable purposes might be thwarted by the verdicts of juries for the negligent acts of those who must necessarily be employed in the execution of the charity. The following authorities appear to sustain the above position: *Hospital v. Ross*, 12 Clark & F. 507; *McDonald v. Hospital*, 120 Mass. 432, 21 Am. Rep. 529; *Gooch v. Association*, 109 Mass. 558; *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495; *Railway Co. v. Artist*, 9 C. C. A. 14, 60 Fed. 365.

In what we have said, we are not to be understood as intimating any

opinion as to whether there is any liability of the trustees for the alleged defect in the construction of the room where the deceased was confined, or of those who were intrusted with his care and treatment. This question was not passed on by the court below, and we express no opinion upon it. The judgment is affirmed.

MONTGOMERY, J., did not sit. The other justices concurred.

II. Employers

1. FOR WRONG OF SERVANT OR AGENT *

PALMERI v. MANHATTAN RY. CO.

(Court of Appeals of New York, 1892. 133 N. Y. 261, 30 N. E. 1001, 16 L. R. A. 136, 28 Am. St. Rep. 632.)

GRAY, J. Quite recently we had occasion to consider a case where the ticket agent of a railroad company directed the arrest, by police officers, of a person in the railroad station, whom he suspected of being a counterfeiter, and the company was thereafter sued for false imprisonment. In that case the facts were briefly stated, that the ticket agent had been notified by the police authorities to watch for men of a certain description, suspected of passing counterfeit bills. Upon a certain occasion two men came into the station, and one of them tendered a bill in payment for tickets. The agent suspected them of being the counterfeiters wanted by the police, and thought the bill looked "queer," but nevertheless took it, and gave back the change with the tickets, saying nothing to them. He then sent for a police officer, to whom he pointed out the men, who were there on the station platform. The bill was subsequently pronounced to be genuine, and the man was discharged. We held that the company was not responsible in damages, because the agent was not, in what he did, acting within the scope and line of his duty. His acts were not such as could be deemed to be performed in the course of his employment, or such as were demanded for the protection of his employer's interest, but rather those of a citizen desirous of aiding the police in the detection and arrest of persons suspected of being engaged in the commission of a crime. His duty, as the particular agent of the company, was to have refused to accept and change the bill tendered in payment for passage tickets, if he supposed it was not genuine; and, when he did accept it, his only purpose could have been to further the efforts of the police authorities by such a step, and could not possibly be considered as something which his employers or his employment required of him. I refer to the case of

* For discussion of principles, see Chapin on Torts, § 53 (1).

Mulligan v. Railway Co., 129 N. Y. 506, 29 N. E. 952, 14 L. R. A. 791, 26 Am. St. Rep. 539 (decided January, 1892). In the present case, however, the acts of the ticket agent were of a different character. The plaintiff purchased a ticket of the agent at the elevated railroad station, and passed through to take the cars, after some altercation about the amount of the change. The ticket agent immediately afterwards came out upon the platform of the station, charged her with having given him a counterfeit piece of money, and demanded another quarter in place of the one given him. She insisted upon her money being genuine, and refused to give another quarter or to hand back the change. He became angry, and called her a counterfeiter and a common prostitute. He placed his hand upon her, and told her not to stir until he had procured a policeman to arrest and to search her. He detained her in the station for a while, but let her go when he failed to get an officer. This action was then brought to recover damages because of injury sustained from the unlawful imprisonment, or the restraint imposed upon the plaintiff's person, accompanied by the slanderous words, publicly spoken, concerning her. The jury believed her story, and the judgment which she has recovered the appellant seeks to avoid principally upon the ground that the ticket agent was acting outside of the scope of his employment in doing the acts complained of. The appeal must fail. This is not like the Mulligan Case. Here the agent was acting for his employers, and with no other conceivable motive; losing his temper and injuring and insulting the plaintiff upon the occasion. He believed that plaintiff had passed a counterfeit piece of money upon him, and thus had obtained a passage ticket and good money in change. What he did was in the endeavor to protect and to recover his employer's property; and if, in his conduct, he committed an error, which was accompanied by insulting language and the detention of the person, the defendant, as his employer, is legally responsible in an action for damages for the injury. For all the acts of a servant or agent which are done in the prosecution of the business intrusted to him the carrier becomes civilly liable, if its passengers or strangers receive injury therefrom. The good faith and motives of the servant are not a defense, if the act was unlawful. Once the relation of carrier and passenger entered upon, the carrier is answerable for all consequences to the passenger of the willful misconduct or negligence of the persons employed by it in the execution of the contract which it has undertaken towards the passenger. This is a reasonable and necessary rule, which has been upheld by this court in many cases, of which *Weed v. Railroad Co.*, 17 N. Y. 362, 72 Am. Dec. 474; *Hamilton v. Railroad Co.*, 53 N. Y. 25; *Stewart v. Railroad Co.*, 90 N. Y. 588, 43 Am. Rep. 185; and *Dwinelle v. Railroad Co.*, 120 N. Y. 117, 24 N. E. 319, 8 L. R. A. 224, 17 Am. St. Rep. 611—are sufficient instances.

What materially distinguishes the present from the Mulligan Case is that there the servant of the company was not acting for the pro-

tection of the company's interests, but went quite outside of the line of his duty to perform a supposed service to the community by procuring the arrest of criminals whom he knew the authorities were endeavoring to apprehend. That did not enter into the transaction of his employer's business. Whereas here the ticket agent clearly was engaged about the company's affairs, but, in the belief of the jury, unlawfully detained the plaintiff, and insulted her by slandering her character. It is needless to consider the case of *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448, so much relied upon by the appellant. There is no parallel between the case of a clerk in a store, who has a person arrested and searched upon suspicion of a theft, and whose general employment could not warrant such an act, and the present case, of an agent who is considered to be invested by the carrier with a discretion and a duty in matters of his employment, from which an authority is inferable to do whatever is necessary about it. Though injury and insult are acts in departure from the authority conferred or implied, nevertheless, as they occur in the course of the employment, the master becomes responsible for the wrong committed. Judge Andrews, in *Rounds v. Railroad Co.*, 64 N. Y. 129, 21 Am. Rep. 597, points out the distinguishing principle of these cases, and refers to *Mali v. Lord* in the course of his opinion.

The offer by defendant, upon plaintiff's cross-examination, to show that she was an habitual litigant, was properly excluded. It had nothing to do with the issue, and, if true, would not prove her unworthy of belief, any more than it would follow from her admission of its truth that the litigations which such a tendency had encouraged were not upon meritorious grounds.

The testimony of the witness Murphy, a bystander upon the occasion, as to the ticket agent's conversation with him, I think, was admissible, as occurring simultaneously, and as illustrating somewhat the transaction; but, even if questionable, the defendant appears to have objected to the testimony after it was in, and obtained no ruling by motion to strike out. When, subsequently, upon it appearing to the court that the plaintiff did not hear the conversation, an objection to the testimony continuing was considered proper by the judge, and was at once sustained. The judgment should be affirmed, with costs. All concur.

STRANAHAN BROS. CATERING CO. v. COIT.⁵

(Supreme Court of Ohio, 1896. 55 Ohio St. 398, 45 N. E. 634, 4 L. R. A. [N. S.] 506.)

Plaintiff, a corporation, alleged that it was engaged in the business of bakers, caterers and in the manufacture of butter, cheese, candies and other confectionery; that defendant had furnished to plaintiff about 120,000 pounds of milk; that at the time he brought the first quantity he had promised and agreed to bring nothing but milk of a superior quality; but he had in fact furnished milk which was adulterated and made foul by stale, filthy and impure water, knowing at the time that it was to be mixed with other milk in plaintiff's factory and to be used in plaintiff's business; that by reason of said adulterated milk the product of plaintiff's factory was greatly lessened and damaged to the damage of the plaintiff in the sum of \$4,000.

At the trial defendant offered evidence to show that he did not water the milk or know that it had been watered, and that he had in his employ one Ed. Miller, who without defendant's knowledge, for the purpose of injuring defendant, had maliciously watered the milk. The plaintiff, upon this question, requested the court to charge the jury as follows: "If the jury shall find that the milk of defendant was delivered at its factory watered, then the defendant would be liable for the damages that necessarily and directly resulted therefrom, even though the defendant did not water such milk, or authorize it to be done, or know the same was or had been watered, if the jury shall find it was watered by one Ed. Miller, the employé of defendant." But the court refused to charge the jury as requested, but did charge the jury upon this question as follows: "If it appear to you that the milk was adulterated by Miller maliciously, to injure Coit, and was without Coit's knowledge so delivered to the factory adulterated, then Mr. Coit is not liable to defendant for any damage resulting to them from such adulterated milk. Mr. Coit, however, would remain liable for the amount of water delivered, but only because it was not milk." No other or further charge upon this subject was given to the jury, nor was the above charge in any way modified, changed, or withdrawn, but was, without change or modification, given by the court to the jury as the law by which they were to be governed in arriving at a verdict in the case.

Exceptions to the refusal to charge as requested, and to the charge as given, were duly entered by plaintiff. Verdict for \$185, for defendant and against plaintiff, was rendered, and a judgment thereon, and for costs, entered, which was affirmed by the circuit court. The plaintiff asks reversal of these judgments.

⁵ For discussion of principles, see Chapin on Torts, § 53 (2).

SPEAR, J. (after stating the facts).⁶ The questions arising on the record are: (1) Whether or not Coit is liable for the acts of Miller which produced the injury; (2) whether or not the plaintiff's damages, in case the jury found it sustained damages, could embrace all the injury arising from the adulterated character of the milk delivered; (3) if not, whether, in any view, the true rule is that, in case the jury found that the milk was adulterated by Miller maliciously, to injure Coit, and was, without Coit's knowledge, so delivered to the factory adulterated, plaintiff was entitled to a rebate for the water, so that Coit would be liable only for the amount of the water delivered, because it was not milk. The inquiry involves, primarily, a consideration of the liability of the master, although, reduced to its last analysis, it is an inquiry as to the proper rule of damages. Upon the face of things it is apparent, that the question regarded as the controlling one is whether or not Coit is in any way responsible for the acts of Miller. * * *

It is important to observe a distinction between liability for the malicious acts of an agent with respect to one with whom the principal holds contractual relations,—acts affecting the performance of the contract,—and with respect to others who may have suffered injury by reason of the agent's torts, as a failure to observe this distinction has resulted in apparent confusion of terms both in text-books and decisions. The distinction referred to is made apparent in an old English case. A traveler employed a livery stable keeper to drive him safely to his destination. The driver purposely and needlessly, to gratify his own personal malice, went out of his way to collide with another carriage, by which one riding therein was injured. The collision also injured the traveler. The action by the former against the master was predicated wholly on the claim that he was liable for the malicious act of his servant, committed without authority, and not in the line of his service. An action by the traveler would have rested on the failure of the liveryman to perform his contract. And, as to the latter proposition, Prof. Wharton, in his work on Agency and Agents (section 487), gives this terse rule: "Principal who contracts to do a particular thing is liable for agent's torts which prevent the performance of the contract." One principle seems to be well settled by the later authorities, viz.: That if the act of the servant which has occasioned the mischief is within the scope of the employment, the fact that it was maliciously done does not affect the question of the master's liability under a proper rule of damages.

Coming, now, to the case at bar were the acts of Miller, which caused the injury, in law the acts of his employer? That is, were they within the scope of his duties, or were they outside and beyond? And here we must not mistake the acts which caused the damage. At first

⁶ The statement of facts is abridged and parts of the opinion of Spear, J., and all of the dissenting opinion of Bradbury, J., are omitted.

blush it might seem that these acts were the watering of the milk, and those were not within any authority from the master. But not so. The putting of the water in the milk would have been quite innocuous, so far as plaintiff is concerned, had the compound not been delivered to the factory. It was the delivery there which produced the harm. In those acts of delivery Miller stood for and represented his master. Clearly, those deliveries were done in the course of his employment, "in the execution of the service for which he was engaged by the master." Under such conditions, why should the master not be liable? He had contracted to deliver pure milk, and, in trusting that duty to his servant, why had he not, applying the principle announced by Judge Story, held out that servant as fit to be trusted, and warranted his fidelity and good conduct in all matters connected with the performance of that contract? Why, in reason, should the loss occasioned by the rascality of the defendant's servant be thrown on the plaintiff? The latter had no voice in his selection; no control over his conduct. Does the servant's motive change the nature of the damages? Does it make the failure of the defendant to perform his contract any the less obvious, or any the less serious in results? As remarked by White, J., in *Railroad Co. v. Young*, 21 Ohio St. 524, 8 Am. Rep. 78: "Where a person is injured by the acts of a servant, done in the course of his employment, we see no good reason why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master." And would any intelligent legal mind suppose for a moment that, the alleged contract being found, if the delivery of the objectionable compound at the factory had been through the mere negligence of the servant, the defendant would not be liable? Surely not. Nor does the enforcement of the rule of damages hereinbefore indicated involve punishment of one for the malicious act of another. If it were proposed to inflict punitive damages on the master where he is innocent of wrong intent, then that inequitable result would follow. But so long as compensation, and compensation only, is the rule, the motive of the servant not entering into the case one way or the other, the master is not held for the motive; he is held only for the act. So, in this case, if the testimony of the plaintiff tended to prove that Coit knew of the condition of the milk at the time of the delivery, as the record would imply, then proof to the contrary was competent, but for the purpose only of excluding a right to recover punitive damages.

This contract involved reciprocal duties, and gave corresponding legal rights. The defendant was to deliver pure milk; the plaintiff was to pay good money. Now, suppose, instead of this action, there were a suit of the defendant against the plaintiff for his season's milk, \$1,150, and the company had pleaded payment. At the trial it appeared

that, on the day the account was due the company had given the money to one of its employes, with directions to go to the vendor and pay for the milk, and he had gone to the residence of the vendor and counted out, as the vendor supposed, \$1,150, and taken a receipt to the company. The next day, when a deposit in bank was attempted, it was found that a portion of the money was counterfeit. Suppose the testimony to further show that the employe, out of malice towards the company and greed in his own interest, had substituted counterfeit money and paid that. Would the company have a defense? The bills paid looked like good currency, as the milk delivered looked like pure milk. In fact both were tainted. Is there any real difference in the two cases? Is it not a failure to perform a contract in both? True, the method of making proof of damages is different; it is simple in one case, and much less so in the other. But, when arrived at, the result is precisely the same. It is compensation in both cases,—the making of the injured party whole. Our case is essentially dissimilar from that of *Railroad Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373, where the defendant was exonerated. If Miller had got into a quarrel with the manager of the factory, about the delivery of milk, for instance, and, to gratify his own personal resentment, had lashed the other with the defendant's whip, which had been furnished him to drive the horses with, we would have had a case parallel with the one above cited. The view here indicated finds support in the broad principle that where one of two innocent persons must suffer he must be the sufferer who puts it in the power of the wrongdoer to cause the loss. "He, certainly, who trusts most, must suffer most." He through whose agency the loss occurred must sustain it. It is a principle founded on the highest considerations of justice and expediency. The rule is elucidated in the opinion by Minshall, J., in the recent case of *Schurtz v. Colvin*, 55 Ohio St. 274, 45 N. E. 527, and special reference is here made to that opinion for argument and illustrations. * See, also, *Quick v. Milligan*, 108 Ind. 419, 9 N. E. 392, 58 Am. Rep. 49; *Blight v. Schenck*, 10 Pa. 293, 51 Am. Dec. 478; *Le Neve v. Le Neve*, 3 Atk. 646. If the foregoing conclusions are correct, it follows that the instructions given the jury did not cover the case before them. The case made was the case which, within the allegations of the petition, the evidence tended to prove. The vital points were the agreement to deliver pure milk, the delivery under it, the character of the milk delivered, and the resulting damage; and the questions the jury needed instructions upon, in case they found for the plaintiff on these propositions, were, the liability or nonliability of Coit, and the measure of damages in case he was to be held. The instruction given was if the adulteration was done by Miller maliciously, to injure Coit, and the delivery of the adulterated article was without Coit's knowledge, he was not liable for any damage; which if we are right in the principles of law applicable to the case, was erroneous. The court also added that Coit

would remain liable for the amount of water delivered, because it was not milk. This means, we suppose, that, on Coit's cross-petition, he would not be allowed to recover pay for water. Of course he could not, but this instruction ignores any duty to deliver milk not adulterated, and would be proper in a case where the quantity delivered was the only question involved. But here was involved the question of damages for the impaired character of the article delivered, and it is difficult to see how, upon the view most favorable to Coit, the rule would not have been the ordinary commercial rule, viz. the difference between the value of the milk delivered and what its value would have been had no water been mixed with it. Swan's Treatise (14th Ed.) 784; American note to Benj. Sales (6th Ed.) 906. * * *

2. FOR WRONG OF INDEPENDENT CONTRACTOR⁷

ATLANTA & F. R. CO. v. KIMBERLY.

(Supreme Court of Georgia, 1891. 87 Ga. 161, 13 S. E. 277, 27 Am. St. Rep. 231.)

SIMMONS, J.⁸ Kimberly sued the railroad company for damages, and alleged in his declaration "that while the company was constructing its road it made a deep cut, and piled the fresh earth therefrom near his dwelling house, and dammed up a small stream, and ponded the water therefrom near the house; and that it also stationed near the house a camp of convicts, whom it was using in said construction, and permitted the filth accumulating in the sinks of this camp and otherwise therein from the convicts to flow from the camp, and be deposited a few yards from the house, by reason of which the air in and around the house became infected with noxious scents, malaria, and other substances injurious to health, whereby plaintiff and his wife both became sick, and endured great pain and suffering, and were unable to attend to their daily duties," etc. The defense of the railroad company was that it did not do the acts complained of in the declaration; that, if they were done at all, they were done by the Chattahoochee Brick Company, an independent contractor, which it had employed to build the railroad from Atlanta to Senoia. On the trial of the case the jury found a verdict for the plaintiff, and the defendant made a motion for a new trial on the various grounds set out therein, which was overruled, and it excepted.

The main question argued before us was whether under the facts of this case the railroad company was liable for the damages sustained

⁷ For discussion of principles, see Chapin on Torts, § 54.

⁸ Portions of the opinion are omitted.

by Kimberly. The general rule of law upon this subject is: Where an individual or corporation contracts with another individual or corporation exercising an independent employment for the latter to do a work not in itself unlawful or attended with danger to others, such work to be done according to the contractor's own methods, and not subject to the employer's control or orders except as to the results to be obtained, the employer is not liable for the wrongful or negligent acts of the contractor or of the contractor's servants. Code, § 2962; *Harrison v. Kiser*, 79 Ga. 588, 4 S. E. 320. And see the following text-books and cases therein cited: 1 Lawson, Rights, Rem. & Pr. § 295; 2 Thomp. Neg. 899 et seq.; Id. 909-913; 2 Wood, Ry. Law, § 284. Also, 1 Add. Torts, 302; Cooley, Torts, 644; Bish. Non-Cont. Law, § 606; Pierce, R. R. 286-291; 1 Rorer, R. R. 468-470; Whit. Smith, Neg. 171 et seq.; Wood, Nuis. 77, p. 81; Dicey, Parties (2d Amer. Ed.) 468 et seq. See especially the following cases: *Peachey v. Rowland*, 22 Law J. C. P. 81, 13 C. B. 182; *Cuff v. Railroad Co.*, 35 N. J. Law, 17, 10 Am. Rep. 205; *Clark v. Railroad*, 39 Mo. 184, 90 Am. Dec. 458; *McCafferty v. Railroad Co.*, 61 N. Y. 178, 19 Am. Rep. 267; *Hughes v. Railway Co.*, 15 Amer. & Eng. R. Cas. 100; *Hilliard v. Richardson*, 3 Gray (Mass.) 349, 63 Am. Dec. 743; *Eaton v. Railway Co.*, 59 Me. 520, 8 Am. Rep. 430; *Railway Co. v. Farver*, 111 Ind. 195, 12 N. E. 296, 60 Am. Rep. 696; *Railway Co. v. Fitzsimmons*, 18 Kan. 34; *Painter v. Pittsburgh*, 46 Pa. 220.

To the general rule there are several exceptions: (1) Where the work is wrongful in itself, or, if done in the ordinary manner, would result in a nuisance, the employer will be liable for injury resulting to third persons, although the work is done by an independent contractor. This is upon the principle that if one contracts with another to commit a nuisance, he is a cotrespasser by reason of his directing or participating in the work; in other words, the rule is that, "if the act or neglect which produces the injury is purely collateral to the work contracted to be done, and entirely the result of the wrongful acts of the contractor and his workman, the proprietor is not liable; but if the injury directly results from the work which the contractor engaged and was authorized to do, he is equally liable with the contractor." 2 Thomp. Neg. 903. See, also, authorities cited supra. (2) If, according to previous knowledge and experience, the work to be done is in its nature dangerous to others, however carefully performed, the employer will be liable, and not the contractor, because, it is said, it is incumbent on him to foresee such danger, and take precautions against it; and this is the principle upon which the cases of *Bower v. Peate*, 1 Q. B. Div. 321; *Tarry v. Ashton*, Id. 314; and *Pickard v. Smith*, 10 C. B. (N. S.) 470—relied on by the defendant in error, were decided. And in this exception is included the principle that where the injury is caused by defective construction which was inherent in the original plan of the employer, the latter is liable. See authorities cited supra; also *Robbins v. Chicago*, 4 Wall. 657, 18 L. Ed. 427; *Boswell v. Laird*, 8

Cal. 469, 68 Am. Dec. 345; *Lancaster v. Insurance Co.*, 92 Mo. 460, 5 S. W. 23, 1 Am. St. Rep. 739. For instance, if any person employs another to erect a building, and the plan of the building is defective, the walls being too thin and weak, and the building while in process of erection falls, and causes injury to a third person, the employer, and not the contractor, is liable. Or, if a contractor is employed to build a sewer, and the employer agrees to furnish the materials, and the sewer-pipe furnished by the employer is too small, and damage is sustained by reason thereof, the employer is liable. (3) The next exception is where the wrongful act is the violation of a duty imposed by express contract upon the employer; for where a person contracts to do a certain thing he cannot evade liability by employing another to do that which he has agreed to perform. For instance, where a company undertook to lay waterpipes in a city, agreeing with the city that it would "protect all persons against damages by reason of excavations made by them in laying pipes, and to be responsible for all damages which might occur by reason of the neglect of their employes in the premises," and the company let out the work to a contractor, who used a steam-drill in such a manner as to frighten a traveler's horse and injure the traveler, it was held by the supreme court of the United States that the company was liable. *Water Co. v. Ware*, 16 Wall. 566, 21 L. Ed. 485. (4) The next exception is where a duty is imposed by statute. The person upon whom a statutory obligation is imposed is liable for any injury that arises to others from its nonperformance or in consequence of its having been negligently performed, either by himself or by a contractor employed by him. Thus, where the statute imposed upon a railroad company, as a duty to the proprietors of inclosures through which the road passed, the obligation of placing stockguards, and preserving or supplying fences, on the right of way, and protecting the inclosure from injury, in the construction of its road, the company was held liable for the failure to perform such duty, though resulting from the negligence of a contractor. *Railroad Co. v. Meador*, 50 Tex. 77. And it was upon this principle that the cases of *Wilson v. White*, 71 Ga. 506, 51 Am. Rep. 269; *Gray v. Pullen*, 5 Best & S. 970; *Hole v. Railroad Co.*, 6 Hurl. & N. 488; and *Railroad Co. v. McCarthy*, 20 Ill. 388, 71 Am. Dec. 285—relied upon by counsel for the defendant in error, were decided. And the case of *Hinde v. Navigation Co.*, 15 Ill. 72, also relied upon for the defendant in error, falls under the same principle. In that case the charter imposed upon the company the duty of paying for all material taken for the use of its work, and expressly gave a remedy against the company; and it was held that the company could not by delegating its work to a contractor escape liability for material taken by him for the work; especially as he was working under the immediate supervision and direction of the engineer of the company. (5) The employer may also make himself liable "by retaining the right to direct and control the time and manner of executing the work, or by interfering with the contractor and assuming control of the work, or

some part of it, so that the relation of master and servant arises, or so that an injury ensues which is traceable to his interference. But merely taking steps to see that the contractor carries out his agreement, as having the work supervised by an architect or superintendent, does not make the employer liable; nor does reserving the right to dismiss incompetent workmen." 1 Lawson, Rights, Rem. & Pr. 299; Harrison v. Kiser, *supra*. (6) The employer may also be held liable upon the ground that he has ratified or adopted the unauthorized wrong of the independent contractor. See Harrison v. Kiser, *supra*; 2 Thomp. Neg. 903, 915.

Applying the foregoing principles to the facts of this case, we find that the railroad company made a contract with the Chattahoochee Brick Company, whereby the latter agreed to build the former's road from Atlanta to Senoia, according to certain specifications; and the railroad company did not retain any control over the contractor as to the method or manner of doing the work. The construction company was to furnish the labor and all the materials, including the pipes with which the sewers or culverts were to be built. All the control reserved by the road was that its superintendent was to see that the road was built according to the contract. There is no indication in the record outside of some loose and illegal declarations of third parties, the admission of which as evidence we will speak of presently, tending to show that the railroad company had any authority, power, or control over the construction, as to the manner or means of doing the work. This being true, the railroad company, under the general rule above announced, is not liable for the negligent acts done by the contractor. It was argued by the able counsel for the defendant in error that the building of a railroad necessarily results in a nuisance, unless certain precautions are taken to prevent it; that the low places by which the surrounding lands are drained and from which the water is carried off must be filled up, and, unless certain precautions are taken to provide an escape for the water, a nuisance necessarily results; and that the railroad company cannot escape liability by having the work done by an independent contractor. If the premises of counsel are true, the conclusion might also be true; but if a railroad is built properly we do not think any nuisance will result from the building. * * *

Nor is there any legal evidence to show that it would fall within the second exception. It is claimed that the pond of water was caused by the sewer pipes being too small to carry it off, but there is no evidence that the railroad company directed that this particular size of pipe should be placed at that point. It is true there are some declarations of Hammond and English to the effect that the superintendent ordered it to be put there, but these declarations were illegal, and should have been excluded. If it should be shown upon the next trial that this particular size of pipe was placed at that point by direction of the company, or if the specifications in the contract required it to be placed there, and it should be further shown that this part of the plan

was inherently defective, and that it caused this nuisance, and the plaintiff sustained injury thereby, the railroad company would be liable. But if the railroad company did not direct this particular size of pipe to be placed at that point, or its plans and specifications did not require it, and it was put there by the contractor according to his own judgment, and negligently placed above the bed of the stream, then the railroad company would not be liable, although it may have had notice from the plaintiff that in his opinion the pipe was too small. If the railroad company had no control over the contractor as to the manner in which he should build the sewer or put in the pipe, any notice which the plaintiff might give its officers would not make it liable. The contractor being in an independent employment, whatever he does outside of or beyond his contract is a collateral act for which the employer is not liable. He is not the servant or agent of the employer, and the employer cannot be held liable for any acts of negligence committed or omitted by him outside of his contract. Where the work he is engaged to do is lawful, the law presumes that he will do it in a lawful manner; and if he does it illegally he is liable and not the employer.

Nor do the facts of the case bring it within the third or the fourth exceptions. There was no duty imposed upon the railroad company, either by contract, or by statute, to do this particular work, or to do it in a particular way. Its charter does not impose upon it the duty of building the road, and does not specify the manner in which it shall be built; nor is any liability imposed upon it for acts of the kind complained of in this case. The authorities all hold that a railroad company has the right to make a contract with other parties for the construction of its road, and it is held that a contract of this character is not such a delegation of its chartered rights as to render the company liable for unauthorized wrongs committed by the contractor or his servants while engaged in the work. * * *

As we have already seen, the case does not come within the fifth exception, for there is no legal evidence that the railroad company had any control over the construction, as to the manner or means of doing the work. Nor does it come within the next exception, for the facts do not show any ratification of the wrongful acts of the contractor. It is not shown when the company accepted the road from the contractor. The evidence does show that the work near the plaintiff's house was done either in March, April, or May, and that about the 1st of June the plaintiff and his wife became sick. But under the contract the road was not to be turned over to the company until several months after this. The company not being in possession of the road at the time the plaintiff received the injury from the nuisance, and there being no evidence to show that it knew there was a nuisance, it cannot be said that the company ratified any act of its contractor which created a nuisance. * * *

III. Joint and Several Liability

1. SINGLE INJURY⁹

SLATER v. MERSEREAU.

(Court of Appeals of New York, 1876. 64 N. Y. 138.)

This action was brought to recover damages for injuries alleged to have resulted from defendant's negligence. The referee found substantially that plaintiffs were lessees and occupants of the first floor and basement of certain premises in the city of New York; that defendant on or about April 8, 1864, had entered into a contract with the owners of lots adjoining the premises occupied by plaintiffs by which defendant agreed to erect and finish a new building on said lots; that defendant entered upon the performance of the contract and subcontracted a portion of the work to Moore & Bryant, the latter agreeing to furnish the materials and do the mason work, also with McKensie & Co., the latter to furnish the materials for and complete the plumber's work and gas fitting, which included the putting up of a leader from the roof to the sewer in the street; that defendant reserved to himself and performed the carpenter's work, including the rafters and planking of the roof; that on or about July 21, 1868, defendant had completed all the carpenter work of the roof, and the plumbers had constructed a pipe connected with the roof which was carried some distance down the wall of the building and which it was intended to connect with the sewer by a continuation of the pipe; that the pipe could not be continued until the wall down which it was carried was cut to accommodate it; that defendant had failed to direct Moore & Bryant to make the necessary cuttings in the wall and omitted to provide any means for carrying off the rainwater; that large quantities of rainwater which had fallen upon the roof ran into the cellar and soaked through into the plaintiff's premises; that Moore & Bryant had erected the vault and sidewalks in such a negligent manner as to permit large quantities of rain water to flow from the street which united with that from the roof and soaked through into plaintiff's premises injuring their stock of goods.

MILLER, J.¹⁰ * * * The defendant, not being liable for the negligence of Moore & Bryant, as subcontractors, could he be liable for the damages which followed, upon the ground stated by the referee in his report. It is true that the defendant and Moore & Bryant were not jointly interested in reference to the separate acts which produced the

⁹ For discussion of general principles, see Chapin on Torts, § 57 (C).

¹⁰ The statement of facts is abridged and a portion of the opinion omitted.

damages. Although they acted independently of each other, they did act at the same time in causing the damages, etc., each contributing towards it, and although the act of each, alone and of itself might not have caused the entire injury, under the circumstances presented there is no good reason why each should not be liable for the damages caused by the different acts of all. The water from both sources commingled together and became one body concentrating at the same locality soaking through the wall into the plaintiffs' premises and injuring the plaintiffs' property; and it cannot be said that the water which the defendant's negligence caused to flow upon the plaintiffs' premises and which became a portion of all which came there, did not produce the damages complained of. The water with which each of the parties were instrumental in injuring the plaintiffs was one mass and inseparable, and no distinction can be made between the different sources from whence it flowed, so that it can be claimed that each caused a separate and distinct injury for which each one is separately responsible. The case presented is not like that where the animals belonging to several owners do damage together and it is held that each owner is not separately liable for the acts of all, as there is only a separate trespass or wrong against each. *Van Steenburgh v. Tobias*, 17 Wend. 562, 31 Am. Dec. 310; *Auchmuty v. Ham*, 1 Denio, 495; *Partenheimer v. Van Order* 20 Barb. 479. No such division can be made of the separate acts in the case at bar, and it bears some analogy to that of *Colegrove v. Harlem & N. H. R. Co. and N. Y. & N. H. R. R. Co.*, 13 N. Y. Super. Ct. 382, 20 N. Y. 49, 75 Am. Dec. 418, where the injury was caused by concurring negligence in the management of the trains of two railroad companies which came in collision, and the defendants were held jointly liable. The collision was but a single act caused by the separate negligence of different parties which together produced the result. Here also the contractor and subcontractors were separately negligent and although such negligence was not concurrent, yet the negligence of both these parties contributed to produce the damages caused at one and the same time. It is no defense for a person against whom negligence which caused damage is proved, to prove that without fault on his part the same damages would have resulted from the act of another (*Webster v. H. R. R. Co.*, 38 N. Y. 260), and as the case stands the referee was justified in holding that the defendant was responsible for the entire damages.

There was no error in the admission or rejection of evidence, and no ground is shown for reversing the judgment.

Judgment affirmed, with costs. All concur. Judgment affirmed.

2. SEPARATE INJURIES¹¹LITTLE SCHUYLKILL NAVIGATION, R. & COAL CO. v.
RICHARD'S ADM'R.

(Supreme Court of Pennsylvania, 1868. 57 Pa. 142, 98 Am. Dec. 209.)

The declaration contained two counts. The first was for injury to the forge dam of plaintiff upon the Little Schuylkill river by reason of defendants, by their servants and employés, casting and throwing into said river, above the dam, and near to and along the said stream large quantities of coal dirt, slate and loose earths, which by action of the water were carried down to and filled up the said dam. Besides the mines of the defendants, there were a number of others on the Little Schuylkill and its tributaries, above Hecla Forge, owned by different owners, entirely independent of the defendants and having no connection with them. The dam was filled by the coal dirt coming down these several streams into it from all these mines.

AGNEW, J.¹² All the assignments of error, from the 4th to the 11th, inclusive, involve substantially the same question, and may be considered together. The plaintiff's intestate was the owner of a dam and water power upon the Little Schuylkill river. In process of time, from 1851 to 1858, the basin of the dam became filled with the coal dirt, washed down by the stream from the mines above, of several owners upon Little Schuylkill, Panther creek, and other tributaries. They were separate collieries, worked independently of each other. The plaintiff seeks to charge the defendants below with the whole injury caused by the filling up of his basin. The substance of the charge and answers to points was, that if at the time the defendants were engaged in throwing the coal dirt into the river, about ten miles above the dam, the same thing was being done at the other collieries, and the defendants knew of this, they were liable for the combined result of all the series of deposits of dirt from the mines above from 1851 till 1858. The aspects of the case were varied, by deposits being made on and along the banks of the streams, which were carried away by ordinary rains and freshets; but the above is the most direct statement of the injury alleged, and is taken therefore as the test of the principle laid down by the court. The doctrine of the learned judge is somewhat novel, though the case itself is new; but, if correct, is well calculated to alarm all riparian owners, who may find themselves by a slight negligence overwhelmed by others in gigantic ruin.

¹¹ For discussion of general principles, see Chapin on Torts, § 57 (C).

¹² The statement of facts is abridged and a portion of the opinion omitted.

It is immaterial what may be the nature of their several acts, or how small their share in the ultimate injury. If, instead of coal dirt, others were felling trees and suffering their tops and branches to float down the stream, finally finding a lodgment in the dam with the coal dirt, he who threw in the coal dirt, and he who felled the trees would each be responsible for the acts of the other. In the same manner separate trespassers who should haul their rubbish upon a city lot, and throw it upon the same pile, would each be liable for the whole, if the final result be the only criterion of liability. But the fallacy lies in the assumption that the deposit of the dirt by the stream in the basin is the foundation of liability. It is the immediate cause of the injury, but the ground of action is the negligent act above. The right of action arises upon the act of throwing the dirt into the stream—this is the tort, while the deposit below is only a consequence. The liability, therefore, began above with the defendant's act upon his own land, and this act was wholly separate, and independent of all concert with others. His tort was several when it was committed, and it is difficult to see how it afterwards became joint, because its consequences united with other consequences. The union of consequences did not increase his injury. If the dirt were deposited mountain high by the stream his dirt filled only its own space, and it was made neither more nor less by the accretions. True, it may be difficult to determine how much dirt came from each colliery, but the relative proportions thrown in by each may form some guide, and a jury in a case of such difficulty, caused by the party himself, would measure the injury of each with a liberal hand. But the difficulty of separating the injury of each from the others would be no reason that one man should be held to be liable for the torts of others without concert. It would be simply to say, because the plaintiff fails to prove the injury one man does him, he may therefore recover from that one all the injury that others do.

This is bad logic and hard law. Without concert of action no joint suit could be brought against the owners of all the collieries, and clearly this must be the test; for, if the defendants can be held liable for the acts of all the others, so each and every other owner can be made liable for all the rest, and the action must be joint and several. But the moment we should find them jointly sued, then the want of concert and the several liability of each would be apparent. These principles are fully sustained by the following cases: *Russell v. Tomlinson et al.*, 2 Conn. 206; *Adams v. Hall*, 2 Vt. 9, 19 Am. Dec. 690; *Van Steenburgh v. Tobias*, 17 Wend. (N. Y.) 562, 31 Am. Dec. 310; *Buddington v. Shearer*, 20 Pick. (Mass.) 477; *Auchmuty v. Ham*, 1 Denio (N. Y.) 495; *Partenheimer v. Van Order*, 20 Barb. (N. Y.) 479. These were cases where the dogs of several owners united in killing sheep, and where the cattle of different owners broke into an inclosure and united in the damage. The concert and united action of the dogs

and cattle were held to create no joint liability of their owners, notwithstanding the difficulty of determining the several injury done by the animals of each. The rule laid down in the last case was that, where the owner of the garden could not prove the injury of each cow, the jury would be justified in concluding that each did an equal injury. Several cases were cited in opposition, but do not, in our opinion, support the doctrine of the charge.

In *Stone v. Dickinson*, 5 Allen (Mass.) 29, 81 Am. Dec. 727, where an officer made an arrest at the same instant upon nine writs, and the parties were held jointly liable for the trespass, the ground of action was the arrest itself, a single act, incapable of division or separation, but being authorized by all, all were held to have been concerned in the very act, which each authorized the same agent to commit. In *Colegrove v. N. Y. & N. H. and N. Y. & Harlem Railroad Companies*, 20 N. Y. 492, 75 Am. Dec. 418, the two companies were using the same track by joint arrangement governed by common rules, the collision of their trains was owing to mutual and concurring negligence and the injury which was single was therefore their concurrent and direct act. They were held to be jointly liable because of their joint use of the track, their common duty to all travelling the road, and their concurrent negligence in the direct act which caused the injury. The case of the party wall in this state was put on the same ground. The distinction between that case and this was sharply defined by our brother Strong. It was there said that the maintenance of an insecure party wall was a tort in which both participated. The act was single, and it was the occasion of the injury. The case is not to be confounded with actions of trespass brought for separate acts done by two or more defendants. Then if there be no concert, no common intent, there is no joint liability. Here, the keeping of the wall safe was a common duty, and a failure to do so was a common neglect. *Klauder v. McGrath*, 35 Pa. 128, 78 Am. Dec. 329. In principle *Bard et al. v. Yohn*, 26 Pa. 482, more resembles this case. There the effects of the independent acts of the defendants on the opposite sides of the street united in causing the injury, but they were not jointly liable, because there was no concert in the acts themselves. * * *

Judgment reversed and a venire facias de novo awarded.

3. RATIFICATION ¹⁸

DEMPSEY v. CHAMBERS.

(Supreme Judicial Court of Massachusetts, 1891. 154 Mass. 330, 28 N. E. 279, 13 L. R. A. 219, 26 Am. St. Rep. 249.)

Action by Patrick Dempsey against James Chambers for the negligence of one McCullock in unloading coal ordered by plaintiff from defendant. McCullock was not the servant of defendant, and undertook to deliver the coal without his direction or knowledge, and in doing so broke a pane of glass in the window of plaintiff's building. Afterwards, and with full knowledge of the accident and delivery of the coal by McCullock, defendant presented a bill therefor to plaintiff, and demanded payment. Trial to the court, judgment for plaintiff, and defendant excepts.

HOLMES, J. This is an action of tort to recover damages for the breaking of a plate-glass window. The glass was broken by the negligence of one McCullock while delivering some coal which had been ordered of the defendant by the plaintiff. It is found as a fact that McCullock was not the defendant's servant when he broke the window, but that the "delivery of the coal by [him] was ratified by the defendant, and that such ratification made McCullock in law the agent and servant of the defendant in the delivery of the coal." On this finding the court ruled "that the defendant, by his ratification of the delivery of the coal by McCullock, became responsible for his negligence in the delivery of the coal." The defendant excepted to this ruling, and to nothing else. We must assume that the finding was warranted by the evidence, a majority of the court being of the opinion that the bill of exceptions does not purport to set forth all the evidence on which the finding was made. Therefore the only question before us is as to the correctness of the ruling just stated.

If we were contriving a new code to-day we might hesitate to say that a man could make himself a party to a bare tort in any case merely by assenting to it after it had been committed. But we are not at liberty to refuse to carry out to its consequences any principle which we believe to have been part of the common law simply because the grounds of policy on which it must be justified seem to us to be hard to find, and probably to have belonged to a different state of society.

It is hard to explain why a master is liable to the extent that he is for the negligent acts of one who at the time really is his servant, acting within the general scope of his employment. Probably master and servant are "feigned to be all one person" by a fiction which is an

¹⁸ For discussion of principles, see Chapin on Torts, § 57 (E).

echo of the *patria potestas* and of the English frankpledge. *Byington v. Simpson*, 134 Mass. 169, 170, 45 Am. Rep. 314; *Fitzh. Abr. "Cor-one,"* pl. 428. Possibly the doctrine of ratification is another aspect of the same tradition. The requirement that the act should be done in the name of the ratifying party looks that way. *New England Dredging Co. v. Rockport Granite Co.*, 149 Mass. 381, 382, 21 N. E. 947; *Fuller & Trimwell's Case*, 2 Leon. 215, 216; *Sext. Dec.* 5, 12; *De Reg. Jur. Reg.* 9; *D.* 43, 26, 13; *D.* 43, 16, 1, § 14, gloss., and cases next cited.

The earliest instances of liability by way of ratification in the English law, so far as we have noticed, were where a man retained property acquired through the wrongful act of another. *Y. B.* 30 Edw. I. 128 (*Roll's Ed.*), 38 Lib. Ass. 223, pl. 9; s. c. 38 Edw. III, 18; 12 Edw. IV. 9, pl. 23; *Plowd.* 8 ad fin. 27, 31. See *Bract.* 158b, 159a, 171b. But in these cases the defendant's assent was treated as relating back to the original act, and at an early date the doctrine of relation was carried so far as to hold that, where a trespass would have been justified if it had been done by the authority by which it purported to have been done, a subsequent ratification might also justify it. *Y. B.* 7 Hen. IV. 34, pl. 1. This decision is qualified in *Fitzh. Abr. "Bayllie,"* pl. 4, and doubted in *Brooke, Abr. "Trespass,"* pl. 86, but it has been followed and approved so continuously and in so many later cases that it would be hard to deny that the common law was as there stated by Chief Justice Gascoigne. *Godb.* 109, 110, pl. 129; 2 Leon. 196, pl. 246; *Hull v. Pickersgill*, 1 Brod. & B. 282; *Muskett v. Drummond*, 10 Barn. & C. 153, 157; *Buron v. Denman*, 2 Exch. 167, 178; *Secretary of State v. Sahaba*, 13 Moore, P. C. 22, 86; *Cheet-ham v. Mayor, etc.*, L. R. 10 C. P. 249; *Wiggins v. U. S.*, 3 Ct. Cl. 412.

If we assume that an alleged principal, by adopting an act which was unlawful when done can make it lawful, it follows that he adopts it at his peril, and is liable if it should turn out that his previous command would not have justified the act. It never has been doubted that a man's subsequent agreement to a trespass done in his name and for his benefit amounts to a command so far as to make him answerable. The *ratihabitio mandato comparatur* of the Roman lawyers and the earlier cases (*D.* 46, 3, 12, § 4; *D.* 43, 16, 1, § 14; *Y. B.* 30 Edw. I. 128) has been changed to the dogma *æquiparatur* ever since the days of Lord Coke. 4 *Inst.* 317. See *Brooke, Abr. "Trespass,"* pl. 113, *Co. Litt.* 207a; *Wing. Max.* 124; *Com. Dig. "Trespass,"* C. 1; *Railway Co. v. Broom*, 6 Exch. 314, 326, 327, and cases hereafter cited.

Doubts have been expressed, which we need not consider, whether this doctrine applied to a case of a bare personal tort. *Adams v. Freeman*, 9 Johns. (N. Y.) 117, 118; *Anderson and Warberton, JJ.*, in *Bishop v. Montague*, *Cro. Eliz.* 824. If a man assaulted another in the street out of his own head, it would seem rather strong to say that if

he merely called himself my servant, and I afterwards assented, without more, our mere words would make me a party to the assault, although in such cases the canon law excommunicated the principal if the assault was upon a clerk. Sext. Dec. 5, 11, 23. Perhaps the application of the doctrine would be avoided on the ground that the facts did not show an act done for the defendant's benefit (*Wilson v. Barker*, 1 Nev. & M. 409, 4 Barn. & Adol. 614; *Smith v. Lozo*, 42 Mich. 6, 3 N. W. 227); as in other cases it has been on the ground that they did not amount to such a ratification as was necessary (*Tucker v. Jerris*, 75 Me. 184; *Hyde v. Cooper*, 26 Vt. 552).

But the language generally used by judges and text-writers, and such decisions as we have been able to find, is broad enough to cover a case like the present, when the ratification is established. *Perley v. Georgetown*, 7 Gray, 464; *Bishop v. Montague*, Cro. Eliz. 824; *Sanderson v. Baker*, 2 W. Bl. 832, 3 Wils. 309; *Barker v. Braham*, 2 W. Bl. 866, 868, 3 Wils. 368; *Badkin v. Powell*, Cowp. 476, 479; *Wilson v. Tumman*, 6 Man. & G. 236, 242; *Lewis v. Read*, 13 Mees. & W. 834; *Buron v. Denman*, 2 Exch. 167, 188; *Bird v. Brown*, 4 Exch. 786, 799; *Railway Co. v. Broom*, 6 Exch. 314, 326, 327; *Roe v. Railway Co.*, 7 Exch. 36, 42, 43; *Ancona v. Marks*, 7 Hurl. & N. 686, 695; *Condit v. Baldwin*, 21 N. Y. 219, 225, 78 Am. Dec. 137; *Exum v. Brister*, 35 Miss. 391; *Railway Co. v. Donahoe*, 56 Tex. 162; *Murray v. Lovejoy*, 2 Cliff. 191, 195, Fed. Cas. No. 9,963. See *Lovejoy v. Murray*, 3 Wall. 1, 9, 18 L. Ed. 129; *Story*, Ag. §§ 455, 456.

The question remains whether the ratification is established. As we understand the bill of exceptions, McCulloch took on himself to deliver the defendant's coal for his benefit, and as his servant, and the defendant afterwards assented to McCulloch's assumption. The ratification was not directed specifically to McCulloch's trespass, and that act was not for the defendant's benefit, if taken by itself, but it was so connected with McCulloch's employment that the defendant would have been liable as master if McCulloch really had been his servant when delivering the coal. We have found hardly anything in the books dealing with the precise case, but we are of opinion that consistency with the whole course of authority requires us to hold that the defendant's ratification of the employment established the relation of master and servant from the beginning, with all its incidents, including the anomalous liability for his negligent acts. See *Coomes v. Houghton*, 102 Mass. 211, 213, 214; *Cooley*, Torts, 128, 129. The ratification goes to the relation, and establishes it *ab initio*. The relation existing, the master is answerable for torts which he has not ratified specifically, just as he is for those which he has not commanded, and as he may be for those which he has expressly forbidden. In *Gibson's Case*, Lane, 90, it was agreed that if strangers, as servants to Gibson, but without his precedent appointment, had seized goods by color of his office, and afterwards had misused the goods, and Gibson ratified the seizure, he thereby became a trespasser *ab initio*, although not privy to the

misusing which made him so; and this proposition is stated as law in Com. Dig. "Trespass," C. 1; *Elder v. Bemis*, 2 Metc. 599, 605. In *Coomes v. Houghton*, 102 Mass. 211, the alleged servant did not profess to act as servant to the defendant, and the decision was that a subsequent payment for his work by the defendant would not make him one. For these reasons, in the opinion of a majority of the court, the exceptions must be overruled. Exceptions overruled.

4. INDEMNITY AND CONTRIBUTION¹⁴

TRUSTEES OF VILLAGE OF GENEVA v. BRUSH ELECTRIC CO.

(Supreme Court of New York, General Term, Fifth Department, 1889. 50 Hun, 581, 3 N. Y. Supp. 595.)

DWIGHT, J. This was an action over, by the plaintiffs, on a judgment recovered against them by one Maloney for personal injuries caused by an obstruction maintained by the defendant in one of the streets of the plaintiff's village. The defendant was under a contract with the plaintiffs to light the streets of the village by electricity. A contract to that purpose was first made in May, 1884, with the "Brush-Swan Electric Light Company of New England." Under that contract the defendants designated the places where the electric lamps should be put, one of which places was at the intersection of Exchange and Jackson streets. Thereupon the Brush-Swan Company, early in June, 1884, for the purpose of supporting the lamp so located, erected the pole which constituted the obstruction complained of in the action of Maloney. It was erected on the east side of Exchange street, and, together with a pole diagonally opposite on Jackson street, served to support the wires from which a lamp was suspended over the intersection of the two streets. Afterwards the Brush-Swan Company transferred all its rights and interests under the contract above mentioned to the defendant; and on the 5th of December, 1884, the latter company entered into a contract with the plaintiffs, by which it undertook, with unimportant modifications, "to fulfill the conditions of the said agreement of the Brush-Swan Electric Light Company." On the 2d day of June, 1885 (the above-mentioned contracts having expired by limitation), the parties to this action entered into a new contract to the same purpose, which contained the provision, "Lamps to be about 35 feet high, and to be as now located;" and on the 10th day of the same month the accident occurred which was the basis of the former action. The pole then stood as it had been originally placed

¹⁴ For discussion of principles, see Chaplin on Torts, § 58.

by the former contractor, a year before. No objection had ever been made by the plaintiff to its location, but, on the contrary, as the court below expressly finds, it had been permitted to remain there "by the consent of the plaintiffs." This finding is one of fact, made in response to the request of the defendant, and is, of course, conclusive upon the plaintiffs, who have neither appealed from the judgment, nor excepted to any of the findings. There is a further finding to the effect "that general directions were given to the agent of the Brush-Swan Electric Company to set said pole inside of the curb." This finding was excepted to, and seems to have been without evidence tending to sustain it. Code Civil Proc. §§ 992, 993. There was no direction which specified or included this pole. The only general direction given, at any time, on the subject of the location of poles related to those employed in an experimental circuit which was set up by the Brush-Swan Company, before any contract was made, and which did not include the pole or the location in question. We have, then, the affirmative finding that the plaintiffs consented to the maintenance of this pole by the defendant in the position in which it was located when the contract was assumed by the latter, and in which it remained when the injury was sustained for which judgment was recovered. By that judgment the pole so located was adjudged to be a nuisance, for which the plaintiff was responsible to the party injured. But the court, at the circuit, found as a conclusion of law that "as between the plaintiff and defendant herein the pole in question was not maintained by the concurrence of the plaintiff." It is not made quite clear what distinction was intended between the terms "consent" and "concurrence," or in what sense it can be said that this pole was maintained with the consent, and without the concurrence, of the plaintiffs. If the maintenance of the pole had involved any affirmative action on the part of the defendant, it might have been said that such action was without the participation or co-operation of the plaintiffs; but, as we have seen, no such action was involved. The defendant had neither set, nor reset, nor repaired the pole. It had simply left it (with the consent of the plaintiffs) where it was placed by the former contractor. Or if the injury for which recovery was had, had resulted from the use of the pole, it might properly have been found that the plaintiffs did not participate in such use. But it must be observed, it was in the location, and not in the use, of the pole that the nuisance consisted. No wrongful or negligent use was alleged or proved. The injury to Maloney resulted, not from any use of the pole, but only from its location. That it was permitted to remain in that location, with the consent of the plaintiffs, is affirmatively found; and, as we have seen, no further concurrence on the part of the plaintiffs was, in the nature of the case, possible. Under these circumstances, consent and concurrence seem to be convertible terms. Such being the case, the plaintiffs are in the position of joint wrongdoers—in the same fault with the defendant—

and hence not entitled to claim indemnity or contribution from the latter.

The general rule, which denies indemnity or contribution to joint wrongdoers, is elementary. The cases in which recovery over is permitted in favor of one who has been compelled to respond to the party injured are exceptions to the general rule, and are based upon principles of equity. Such exceptions obtain in two classes of cases: First, where the party claiming indemnity has not been guilty of any fault except technically or constructively, as where an innocent master is held to respond for the tort of his servant acting within the scope of his employment; or, second, where both parties have been in fault, but not in the same fault, towards the party injured, and the fault of the party from whom indemnity is claimed was the primary and efficient cause of the injury. Very familiar illustrations of the second class are found in cases of recovery against municipalities for obstructions to the highways caused by private persons. The fault of the latter is the creation of the nuisance; that of the former, the failure to remove it in the exercise of its duty to care for the safety of the public streets. The first was a positive tort, and the efficient cause of the injury complained of; the latter, the negative tort of neglect to act upon notice, express or implied. Of the latter class are the cases, cited by counsel for the respondents, of *Village of Port Jarvis v. Bank*, 96 N. Y. 550; *Village of Seneca Falls v. Zalinski*, 8 Hun, 575; *City of Rochester v. Montgomery*, 72 N. Y. 65; *Lowell v. Railroad Co.*, 23 Pick. (Mass.) 24, 34 Am. Dec. 33. The case at bar is distinguished from these and all similar cases, by the fact, affirmatively found by the court, that the plaintiffs consented to the maintenance of the pole in the position in which the defendant received it from the former contractor. In most of the cases of this class the notice to the municipality, which charges it with negligence, is constructive merely (see *Lowell v. Railroad Co.*, *supra*); but, even though the fact of negligence be established by proof of express notice, the fault of the municipality is negative, and the latter is not in the same fault, or in *pari delicto*, with the wrongdoer. To this case we think the language of the court by Allen, J., in *Johnson v. Oppenheim*, 55 N. Y. 280, is fully applicable: "As one who has consented to an act cannot maintain an action for any loss sustained by him, so no one can avoid an obligation or relieve himself from a duty to another, by the act of a third party to which he has consented." On the grounds indicated we think the first conclusion of law, to the effect that the pole in question was not maintained with the concurrence of the plaintiffs, and the final conclusion, that the plaintiffs are entitled to recover against the defendant, were not warranted by the findings of fact, or by the evidence in the case. For these reasons the judgment should be reversed and a new trial granted; costs to abide event. All concur.

CONFLICT OF LAWS

I. Transitory and Local Actions¹

ELLENWOOD v. MARIETTA CHAIR CO.

(Supreme Court of the United States, 1895. 158 U. S. 105, 15 Sup. Ct. 771, 39 L. Ed. 913.)

GRAY, J.² * * * By the law of England, and of those states of the Union whose jurisprudence is based upon the common law, an action for trespass upon land, like an action to recover the title or the possession of the land itself, is a local action, and can only be brought within the State in which the land lies. *Livingston v. Jefferson*, 1 Brock. 203, Fed. Cas. No. 8,411; *McKenna v. Fisk*, 1 How. 241, 247, 11 L. Ed. 117; *Northern Indiana Railroad v. Michigan Central Railroad*, 15 How. 233, 242, 251, 14 L. Ed. 674; *Huntington v. Attrill*, 146 U. S. 657, 669, 670, 13 Sup. Ct. 224, 36 L. Ed. 1123; *British South Africa Co. v. Companhia de Mocambique*, [1893] App. Cas. 602; *Cragin v. Lovell*, 88 N. Y. 258; *Allin v. Connecticut River Co.*, 150 Mass. 560, 23 N. E. 581, 6 L. R. A. 416; *Thayer v. Brooks*, 17 Ohio, 489, 492, 49 Am. Dec. 474; *Kinthead's Code Pleading*, § 35.

The original petition contained two counts, the one for trespass upon land, and the other for taking away and converting to the defendant's use personal property; and the cause of action stated in the second count might have been considered as transitory, although the first was not. *McKenna v. Fisk*, above cited; *Williams v. Breedon*, 1 Bos. & Pul. 329.

But the petition, as amended by the plaintiff, on motion of the defendant, and by order and leave of the court, contained a single count, alleging a continuing trespass upon the land by the defendant, through its agents, and its cutting and conversion of timber growing thereon. This allegation was of a single cause of action, in which the trespass upon the land was the principal thing and the conversion of the timber was incidental only, and could not, therefore, be maintained by proof of the conversion of personal property, without also proving the trespass upon real estate. *Cotton v. United States*, 11 How. 229, 13 L. Ed. 675; *Eames v. Prentice*, 8 Cush. (Mass.) 337; *Howe v. Willson*, 1 Denio (N. Y.) 181; *Dodge v. Colby*, 108 N. Y. 445, 15 N. E. 703; *Merriman v. McCormick Co.*, 86 Wis. 142, 56 N. W. 743. The entire cause of action was local. The land alleged to have been trespassed upon being in West Virginia, the action could

¹ For discussion of principles, see Chapin on Torts, § 59.

² A portion of the opinion is omitted.

not be maintained in Ohio. The Circuit Court of the United States, sitting in Ohio, had no jurisdiction of the cause of action, and for this reason, if for no other, rightly ordered the case to be stricken from its docket, although no question of jurisdiction had been made by demurrer or plea. *British South Africa Co. v. Companhia de Mocambique*, [1893] App. Cas. 602, 621; *Weidner v. Rankin*, 26 Ohio St. 522; *Youngstown v. Moore*, 30 Ohio St. 133; Ohio Rev. St. § 5064. Judgment affirmed.³

II. Wrongfulness by Lex Loci⁴

LE FOREST v. TOLMAN.

(Supreme Judicial Court of Massachusetts, 1875. 117 Mass. 109, 19 Am. Rep. 400.)

GRAY, C. J.⁵ In order to maintain an action of tort, founded upon an injury to person or property, and not upon a breach of contract, the act which is the cause of the injury and the foundation of the action must at least be actionable or punishable by the law of the place in which it is done, if not also by the law of the place in which redress is sought. *Smith v. Condry*, 1 How. 28, 11 L. Ed. 35, s. c. 17 Pet. 20; *The China*, 7 Wall. 53, 64, 19 L. Ed. 67; *Blad's Case*, 3 Swanst. 603; *Blad v. Bamfield*, 3 Swanst. 604; *General Steam Navigation Co. v. Guillou*, 11 M. & W. 877; *Phillips v. Eyre*, L. R. 4 Q. B. 225, 239, and L. R. 6 Q. B. 1; *The Halley*, L. R. 2 Adm. 3, and L. R. 2 P. C. 193; *Stout v. Wood*, 1 Blackf. (Ind.) 71; *Wall v. Hoskins*, 27 N. C. 177; *Mahler v. Norwich & New York Transportation Co.*, 35 N. Y. 352; *Needham v. Grand Trunk Railway*, 38 Vt. 294; *Richardson v. New York Central Railroad*, 98 Mass. 85.

In the case at bar, the injury sued for was done to the plaintiff in New Hampshire by a dog owned and kept by the defendant in Massachusetts. Such an action could not be maintained at common law, without proof that the defendant knew that his dog was accustomed to attack and bite mankind. *Popplewell v. Pierce*, 10 Cush. 509; *Pressey v. Wirth*, 3 Allen, 191. No evidence of such knowledge, or of the law of New Hampshire, was introduced at the trial. Nor is it contended that the defendant would be liable to any action or indictment by the laws of that state.

³ Compare *Stone v. U. S.*, 167 U. S. 178, 182, 17 Sup. Ct. 778, 42 L. Ed. 127 (1897) where it is pointed out that the principal case proceeded on the theory that the allegations of the petition presented a single cause of action in which the trespass upon the land was the principal thing and the conversion of the property was incidental only.

⁴ For discussion of principles, see Chapin on Torts, § 60.

⁵ The statement of facts is omitted.

The plaintiff relies upon the statute of this commonwealth, which provides that "every owner or keeper of a dog shall forfeit to any person injured by it double the amount of the damage sustained by him, to be recovered in an action of tort." Gen. St. 1860, c. 88, § 59. This statute is not a penal, but a remedial, statute, giving all the damages to the person injured. *Mitchell v. Clapp*, 12 Cush. 278. It does not declare the owning or keeping of a dog to be unlawful, but that if the dog injures another person, the owner or keeper shall be liable, without regard to the question whether he had or had not a license to keep the dog. The wrong done to the person injured consists not in the act of the master in owning or keeping, or neglecting to restrain, the dog, but in the act of the dog for which the master is responsible.

The defendant having done no wrongful act in this commonwealth, and the injury for which the plaintiff seeks to recover damages having taken place in New Hampshire, and not being the subject of action or indictment by the laws of that state, this action cannot be maintained.

Exceptions sustained.

PART II

SPECIFIC TORTS—INFRINGEMENT OF PERSONAL SECURITY

I. Assault ¹

BEACH v. HANCOCK.

(Supreme Court of Judicature of New Hampshire, 1853. 27 N. H. 223, 59 Am. Dec. 373.)

Trespass for an assault. At the trial it appeared that the plaintiff and the defendant were engaged in an angry altercation, when the defendant stepped into his office and brought forth a gun, which he pointed in an excited and threatening manner at the plaintiff, who was standing three or four rods distant. The gun was not loaded, but this fact was not known to the plaintiff. The evidence tended to show that the defendant snapped the gun twice at the plaintiff. The court ruled that pointing a gun, in an angry and threatening manner, at a person three or four rods distant, who was ignorant whether the gun was loaded or not, was an assault, though it should appear that the gun was not loaded, and that it made no difference whether the gun was snapped or not. The court further instructed the jury that, in assessing the damages, it was their right and duty to consider the effect which the finding of light or trivial damages would have to encourage disturbances and breaches of the peace. Defendant excepted to both of these instructions.

GILCHRIST, C. J.² * * * One of the most important objects to be attained by the enactment of laws and the institutions of civilized society is, that each of us shall feel secure against unlawful assaults. Without such security society loses most of its value. Peace and order and domestic happiness, inexpressibly more precious than mere forms of government, cannot be enjoyed without the sense of perfect security. We have a right to live in society without being put in fear of personal harm. But it must be a reasonable fear of which we complain. And surely it is not unreasonable for a person to entertain a fear of personal injury when a pistol is pointed at him in a threatening man-

¹ For discussion of principles, see Chapin on Torts, § 61.

² The statement of the case is abridged and a portion of the opinion omitted.

ner, when, for aught he knows, it may be loaded, and may occasion his immediate death. The business of the world could not be carried on with comfort if such things could be done with impunity.

We think the defendant guilty of an assault, and we perceive no reason for taking any exception to the remarks of the court. Finding trivial damages for breaches of the peace, damages incommensurate with the injury sustained, would certainly lead the ill disposed to consider an assault as a thing that might be committed with impunity. But, at all events, it was proper for the jury to consider whether such a result would or would not be produced. *Flanders v. Colby*, 28 N. H. 34.

Judgment on the verdict.

TUBERVILLE v. SAVAGE.

(Court of King's Bench, 1669. 1 Mod. 3.)

Action of assault, battery, and wounding. The evidence to prove a provocation was that the plaintiff put his hand upon his sword and said, "If it were not assize time, I would not take such language from you." The question was if that were an assault. The court agreed that it was not; for the declaration of the plaintiff was that he would not assault him, the judges being in town; and the intention as well as the act makes an assault. Therefore, if one strike another upon the hand or arm or breast, in discourse, it is no assault, there being no intention to assault; but if one, intending to assault, strike at another and miss him, this is an assault; so if he hold up his hand against another in a threatening manner and say nothing, it is an assault.

II. Battery

1. DEFENSE OF PERSON³

THOMASON v. GRAY.

(Supreme Court of Alabama, 1886. 82 Ala. 291, 3 South. 38.)

This action was brought by Roland B. Gray, against Robert P. Thomason, to recover damages for an assault and battery; and was commenced on the 22d of March, 1886. The cause was tried on issue joined on the plea of not guilty, and resulted in a verdict for the plaintiff, "for \$200 compensatory damages," on which judgment was rendered in his favor. On the trial, as appears from the bill of exceptions,

³ For discussion of principles, see Chapin on Torts, § 63 (A).

the evidence showed that the difficulty between the parties occurred in December, 1885, at the defendant's store or place of business in the town of Oxford; that the plaintiff had gone to town in a wagon, with a load of apples and other produce for sale, and having bargained with the defendant for the sale of some apples, went to his house or place of business to deliver them; that a dispute there arose between them, in which each used abusive words towards the other; and which resulted in a personal rencontre, the plaintiff being struck in the back with a piece of scantling, and badly cut in the neck. As to the circumstances attending the difficulty, the evidence was conflicting; the testimony of each party tending to show that the other was the aggressor. The plaintiff, according to the evidence adduced by him, "was a youth fifteen or sixteen years old, and weighed about 108 pounds, while the defendant was a good-sized man." For the purpose of showing that no punitive damages ought to be recovered against him, the defendant offered in evidence an indictment found against him on account of this same assault and battery on the plaintiff, which prosecution was still pending and undetermined; and he duly excepted to the ruling of the court excluding this evidence.

The court gave the following charges to the jury on the request of the plaintiff: (1) "Even if the jury believe from the evidence that the plaintiff was in fault in bringing on the difficulty; yet if they believe from the evidence that the defendant's retaliation was disproportionate to and excessive of the necessity or provocation received, they must find for the plaintiff." (2) "If the jury believe from all the evidence that the defendant brought on the difficulty, then he cannot invoke the doctrine of self-defence." (3) "If the jury believe from all the evidence that the defendant unlawfully, wantonly and intentionally assaulted the plaintiff with a knife and cut him, they may, in addition to actual damages, assess exemplary or punitive damages as a punishment to the defendant if the assault was attended with circumstances of aggravation." (4) "The jury may look to the size and age of the parties, if proved in determining the amount of force necessary to be used by the defendant in putting plaintiff out of the house." The defendant duly excepted to each of these charges, and he here assigns them as error, together with the exclusion of the evidence offered and excluded.

SUMMERVILLE, J. There may no doubt be cases of assault and battery, as well as mere assault which would sustain a civil action for damages, and yet not be punishable criminally by indictment. An assault with an unloaded gun or pistol might be one of this character; as would also a battery resulting from the fault or negligence of the defendant, without any criminal intent. 2 Green. Ev. § 85; Chapman v. State, 78 Ala. 463, 56 Am. Rep. 42. The only difference as to proof would be that a civil action might be sustained by a preponderance of evidence, producing the proper conviction in the mind of the

jury, and a criminal indictment only by proving the defendant's guilt beyond a reasonable doubt. But, however this may be, it is very clear that in all cases, where a defendant is guilty of a criminal or indictable assault and battery, a civil action for damages would, on the same state of facts, lie against him in favor of the party assaulted and beaten. Self-defence is an excuse for the one as much as the other, and this must be so under precisely the same principles. In civil actions, as well as in criminal, the rule obtains that if the defendant was the aggressor, and brought on the difficulty, he cannot invoke the doctrine of self-defence, because it would be allowing him to take advantage of his own wrong. So the doctrine being based on necessity, the party resorting to it can go no further, in doing damage or violence to his adversary, than what is reasonably necessary and unavoidable. His retaliation cannot innocently be disproportionate to the necessities of the occasion, or excessive of the provocation received. It could only lead to confusion and uncertainty, to attempt laying down a different rule for these two classes of cases. The first and second charges given by the court at the request of the plaintiff were in full harmony with these views, and were properly given.

It was competent for the jury to look at the age and relative size of the parties, if satisfactorily proven, in determining the amount of force which was necessary to be used by the defendant in putting the plaintiff off of his premises. The jury might more readily conclude that a man of proportionally large size would be more culpable in resorting to the use of a knife for such a purpose than a relatively small man might be under like circumstances. The court did not err in giving the fourth charge to the jury.

The other rulings of the court affect only the recovery of exemplary damages; and these we need not consider, for the reason that the verdict of the jury and judgment of the court show expressly a recovery only for compensatory damages. If error, therefore, which we do not decide, such rulings would be error without injury. Affirmed.

2. DEFENSE OF PROPERTY ⁴

SCRIBNER v. BEACH.

(Supreme Court of New York, 1847. 4 Denio, 448, 47 Am. Dec. 265.)

Trespass for assaulting, beating and wounding the plaintiff. Plea not guilty, with notice of son assault demesne, and that the assault was committed in the defence of the defendant's personal property,

⁴ For discussion of principles, see Chapin on Torts, § 63 (B).

namely, a pit of charcoal and a coal rake. The trial took place at the Greene circuit in May, 1844, before Parker, Cir. J.

It appeared that the affair which gave rise to the action happened in August, 1842, on a piece of land in Catskill, of which the defendant had been in possession about three years before. He removed to Herkimer county and the plaintiff succeeded to the occupancy of the land, and had burned a coal pit upon it, and was engaged in taking the coal to market. While he was absent for that purpose, the defendant came to the pit and commenced raking out the coal with a rake he found there, having a wagon in readiness to take the coal away. While thus engaged the plaintiff came there and asked the defendant what he was doing. Defendant said if he came there he would show him. Upon this the plaintiff took hold of the rake with a view of taking it from the defendant, who letting go, with one hand knocked the plaintiff down. As he arose he again took hold of the rake, but the defendant pulled it away, and with it aimed a blow at the plaintiff's head, which the latter sought to prevent by putting up his hand. The rake struck his arm near the wrist and fractured the bone.

The defendant offered to show that he had title to the land upon which the coal pit was burned, which was uncultivated and unimproved; and that the coal was made from his wood cut upon that land. The plaintiff's counsel objected to this evidence, and the objection was sustained and the evidence excluded. Verdict for the plaintiff \$150. The defendant moves for a new trial on a case.

By the Court, JEWETT, J. Self-defence is a primary law of nature, and it is held an excuse for breaches of the peace and even for homicide itself. But care must be taken that the resistance does not exceed the bounds of mere defence, prevention or recovery, so as to become vindictive; for then the defender would himself become the aggressor. The force used must not exceed the necessity of the case. *Elliott v. Brown*, 2 Wend. 497, 20 Am. Dec. 644; *Gates v. Lounsbury*, 20 John. 427; *Gregory v. Hill*, 8 T. R. 299; *Baldwin v. Hayden*, 6 Conn. 453; 3 Bl. Com. 3 to 5; 1 Hawk. P. C. 130; *Cockcroft v. Smith*, 2 Salk. 642; *Curtis v. Carson*, 2 N. H. 539.

A man may justify an assault and battery in defence of his lands or goods, or of the goods of another delivered to him to be kept. Hawk. P. C. b. 1, c. 60, § 23; *Seaman v. Cuppledick*, Owen's R. 150. But in these cases, unless the trespass is accompanied with violence, the owner of the land or goods will not be justified in assaulting the trespasser in the first instance, but must request him to depart or desist, and if he refuses, he should gently lay his hands on him for the purpose of removing him, and if he resist with force, then force sufficient to expel him may be used in return by the owner. *Weaver v. Bush*, 8 Term R. 78; *Butler's N. P.* 19; 1 East P. C. 406. It is otherwise if the trespasser enter the close with force; in that case the owner may without previous request to depart or desist, use violence in re-

turn, in the first instance, proportioned to the force of the trespasser, for the purpose, only, of subduing his violence.

"A civil trespass," says Holroyd, J., "will not justify the firing a pistol at the trespasser, in sudden resentment or anger. If a person takes forcible possession of another's close, so as to be guilty of a breach of the peace, it is more than a trespass; so if a man with force invades and enters the dwelling house of another. But a man is not authorized to fire a pistol on every invasion or intrusion into his house; he ought, if he has a reasonable opportunity, to endeavor to remove the trespasser without having recourse to the last extremity." *Mead's Case*, 1 Lewin, C. C. 185; *Roscoe's C. Ev.* 262. The rule is that, in all cases of resistance to trespassers, the party resisting will be guilty in law of an assault and battery, if he resists with such violence that it would, if death had ensued, have been manslaughter. Where one manifestly intends and endeavors, by violence or surprise, to commit a known felony upon a man's person (as to rob, or murder, or to commit a rape upon a woman), or upon a man's habitation or property (as arson or burglary), the person assaulted may repel force by force; and even his servant then attendant on him, or any other person present, may interpose for preventing mischief; and in the latter case the owner, or any part of his family, or even a lodger with him, may kill the assailant, for preventing the mischief. *Foster's Crown Law*, 273.

The resumption of the possession of land and houses by the mere act of the party is frequently allowed. Thus a person having a right to the possession of lands may enter by force, and turn out a person who has a mere naked possession, and cannot be made answerable in damages to a party who has no right, and is himself a tortfeasor. Although if the entry in such case be with a strong hand, or a multitude of people, it is an offence for which the party entering must answer criminally. *Hyatt v. Wood*, 4 John. 150, 4 Am. Dec. 258; *Sampson v. Henry*, 13 Pick. (Mass.) 36.

In respect to personal property, the right of recaption exists, with the caution that it be not exercised violently, or by breach of the peace; for, should these accompany the act, the party would then be answerable criminally. But the riot, or force, would not confer a right on a person who had none; nor would they subject the owner of the chattel to a restoration of it, to one who was not the owner. *Hyatt v. Wood*, *supra*. In the case of personal property, improperly detained or taken away, it may be taken from the house and custody of the wrongdoer, even without a previous request; but unless it was seized or attempted to be seized forcibly, the owner cannot justify doing any thing more than gently laying his hands on the wrongdoer to recover it. *Weaver v. Bush*, *supra*; *Com. Dig. Pleader*, 3, M. 17; *Spencer v. McGowen*, 13 Wend. 256.

In one branch of the defence the defendant set up son assault demesne. That was overthrown by evidence showing a manifest dis-

proportion between the battery given and the first assault. Even a wounding was proved. The defendant also relied upon a defence of his possession of certain personal property, which he insisted was invaded by the plaintiff, and in the defence of which he committed the assault. To sustain this defence he proposed to prove that the coal pit was on new and unimproved land to which he had title, and that the wood from which the coal was made was cut from this land without any authority from him; but this evidence was rejected. The object of strife between the parties was the possession of the rake, not the coal. The plaintiff is not shown to have committed a single act tending to disturb the defendant in his possession of the latter. The ownership of the coal, therefore, was not a material fact. But admitting that the defendant had a legal title to the coal, and that the plaintiff's object in regaining possession of the rake was to use it as a means of retaking the possession of the coal, still, the defendant could not justify the *wounding* merely in defence of his possession. *Gregory v. Hill*, *supra*. Unless the plaintiff first attempted forcibly to take the coal, of which there was no proof, I think the evidence was immaterial, and was properly overruled.

New trial denied.⁵

3. RECAPTION AND ENTRY

(A) *Personal Property* ⁶

COMMONWEALTH v. DONAHUE.

(Supreme Judicial Court of Massachusetts, 1889. 148 Mass. 529, 20 N. E. 171, 2 L. R. A. 623, 12 Am. St. Rep. 591.)

HOLMES, J. This is an indictment for robbery, in which the defendant has been found guilty of an assault. The evidence for the commonwealth was that the defendant had bought clothes amounting to \$21.55 of one Mitchelman, who called at the defendant's house by appointment for his pay; that some discussion arose about the bill, and that the defendant went up stairs, brought down the clothes, placed them on a chair and put \$20 on a table, and told Mitchelman that he could have the money or the clothes; that Mitchelman took the money, and put it in his pocket, and told the defendant he owed him \$1.55, whereupon the defendant demanded his money back, and, on Mitchelman refusing, attacked him, threw him on the floor, and choked him, until Mitchelman gave him a pocketbook containing \$29. The defendant's counsel denied the receiving of the pocketbook, and

⁵ Compare *Hannabalsen v. Sessions*, *infra*, p. 180.

⁶ For discussion of principles, see Chapin on Torts, § 63 (C).

said that he could show that the assault was justifiable under the circumstances of the case, as the defendant believed that he had a right to recover his own money by force, if necessary. The presiding justice stated that he should be obliged to rule that the defendant would not be justified in assaulting Mitchelman to get his own money, and that he should rule as follows: "If the jury are satisfied that the defendant choked and otherwise assaulted Mitchelman, they would be warranted in finding the defendant guilty, although the sole motive of the defendant was by this violence to get from Mitchelman by force money which the defendant honestly believed to be his own." Upon this the defendant saved his exceptions, and declined to introduce evidence. The jury were instructed as stated, and found the defendant guilty.

On the evidence for the commonwealth, it appeared, or, at the lowest, the jury might have found, that the defendant offered the \$20 to Mitchelman only on condition that Mitchelman should accept that sum as full payment of his disputed bill, and that Mitchelman took the money, and at the same moment, or just afterwards, as part of the same transaction, repudiated the condition. If this was the case, since Mitchelman, of course, whatever the sum due him, had no right to that particular money except on the conditions on which it was offered (*Commonwealth v. Stebbins*, 8 Gray, 492), he took the money wrongfully from the possession of the defendant; or the jury might have found that he did, whether the true view be that the defendant did not give up possession, or that it was obtained from him by Mitchelman's fraud (*Commonwealth v. Devlin*, 141 Mass. 423, 431, 6 N. E. 64; *Chisser's Case*, T. Raym. 275, 276; *Regina v. Thompson*, Leigh & Cave, 225; *Regina v. Stanley*, 12 Cox, C. C. 269; *Regina v. Rodway*, 9 C. & P. 784; *Rex v. Williams*, 6 C. & P. 390; 2 East, P. C. c. 16, §§ 110-113). See *Regina v. Cohen*, 2 Denn. C. C. 249, and cases *infra*. The defendant made a demand, if that was necessary—which we do not imply—before using force. *Green v. Goddard*, 2 Salk. 641; *Polkinhorn v. Wright*, 8 Q. B. (N. S.) 197; *Commonwealth v. Clark*, 2 Metc. 23, 25; and cases *infra*. It is settled by ancient and modern authority that under such circumstances a man may defend or regain his momentarily interrupted possession by the use of reasonable force, short of wounding, or the employment of a dangerous weapon. *Commonwealth v. Lynn*, 123 Mass. 218; *Commonwealth v. Kennard*, 8 Pick. 133; *Anderson v. State*, 6 Bax. (Tenn.) 608; *State v. Elliot*, 11 N. H. 540, 545; *Rex v. Milton*, Mood. & Malk. 107; Y. B. 9 Ed. IV. 28, pl. 42; 19 Hen. VI. 31, pl. 59; 21 Hen. VI. 27, pl. 9. See *Seaman v. Cuppledick*, Owen, 150; *Taylor v. Markham*, Cro. Jac. 224, s. c. Yelv. 157, 1 Brownl. 215; *Shingleton v. Smith*, Lutw. 1481, 1483; 2 Inst. 316; *Finch, Law*, 203; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Com. 121. To this extent the right to protect one's possession has been regarded as an extension of the right to protect one's person, with which it is generally mentioned. *Baldwin v.*

Hayden, 6 Conn. 453; Y. B. 19 Hen. VI. 31, pl. 59; *Rogers v. Spence*, 13 M. & W. 571, 581; 2 Hawk. P. C. c. 60, § 23; 3 Bl. Com. 120, 131.

We need not consider whether this explanation is quite adequate. There are weighty decisions which go further than those above cited, and which hardly can stand on the right of self-defense, but involve other considerations of policy. It has been held that even where a considerable time had elapsed between the wrongful taking of the defendant's property and the assault, the defendant had a right to regain possession by reasonable force, after demand upon the third person in possession, in like manner as he might have protected it without civil liability. Whatever the true rule may be, probably there is no difference in this respect between the civil and the criminal law. *Blades v. Higgs*, 10 C. B. (N. S.) 713, 12 C. B. (N. S.) 501, 13 C. B. (N. S.) 844, 11 H. L. Cas. 621; *Commonwealth v. McCue*, 16 Gray, 226, 227. The principle has been extended to a case where the defendant had yielded possession to the person assaulted, through the fraud of the latter. *Hodgeden v. Hubbard*, 18 Vt. 504, 46 Am. Dec. 167. See *Johnson v. Perry*, 56 Vt. 703, 48 Am. Rep. 826. On the other hand, a distinction has been taken between the right to maintain possession and the right to regain it from another who is peaceably established in it, although the possession of the latter is wrongful. *Bobb v. Bosworth*, Litt. Sel. Cas. (Ky.) 81, 12 Am. Dec. 273. See *Barnes v. Martin*, 15 Wis. 240, 82 Am. Dec. 670; *Andre v. Johnson*, 6 Blackf. (Ind.) 375; *Davis v. Whitridge*, 2 Strob. (S. C.) 232; 3 Bl. Com. 4. It is unnecessary to decide whether in this case, if Mitchelman had taken the money with a fraudulent intent, but had not repudiated the condition until afterwards, the defendant would have had any other remedy than to hold him to his bargain, if he could, even if he knew that Mitchelman still had the identical money upon his person. If the force used by the defendant was excessive, the jury would have been warranted in finding him guilty. Whether it was excessive or not was a question for them; the judge could not rule that it was not, as matter of law. *Commonwealth v. Clark*, 2 Metc. 23. Therefore the instruction given to them, taken only literally, was correct. But the preliminary statement went further, and was erroneous; and, coupling that statement with the defendant's offer of proof, and his course after the rulings, we think it fair to assume that the instruction was not understood to be limited, or indeed to be directed, to the case of excessive force, which, so far as appears, had not been mentioned, but that it was intended and understood to mean that any assault to regain his own money would warrant finding the defendant guilty. Therefore the exceptions must be sustained.

It will be seen that our decision is irrespective of the defendant's belief as to what he had a right to do. If the charge of robbery had been persisted in, and the difficulties which we have stated could have been got over, we might have had to consider cases like *Regina*

v. Boden, 1 C. & K. 395, 397; Regina v. Hemmings, 4 F. & F. 50; State v. Hollyway, 41 Iowa, 200, 20 Am. Rep. 586. Compare Commonwealth v. Stebbins, 8 Gray, 492; Commonwealth v. McDuffy, 126 Mass. 467. There is no question here of the effect of a reasonable but mistaken belief with regard to the facts. State v. Nash, 88 N. C. 618. The facts were as the defendant believed them to be.

Exceptions sustained.

(B) *Real Property* †

BRISTOR v. BURR.

(Court of Appeals of New York, 1890. 120 N. Y. 427, 24 N. E. 937, 8 L. R. A. 710.)

BRADLEY, J. The action was brought to recover for an alleged assault upon and forcible eviction of the plaintiff from a house in which he was residing, and for the alleged conversion of certain of his personal property, then in the house at Spring Valley in the county of Rockland. The plaintiff was a member of the Newark conference of the Methodist Episcopal Church, by which he was stationed as a preacher in March, 1885, at Spring Valley, and continued to preach in the church at that place until the 15th of January, 1886, when he was suspended from all ministerial services and church privileges. This was done in accordance with the rules and discipline of the Methodist Church and was effectual as a suspension until the then next annual conference in March following. From the time he went to that place to preach, the plaintiff, with his family resided in a house which had, for several years, been occupied by the Methodist ministers as a parsonage. On March 17, 1886, the defendants forcibly ejected the plaintiff from the house. It is of that act and the alleged conversion of his goods then in the parsonage that the plaintiff complains. The trial court held, as matter of law, and instructed the jury, that the eviction of the plaintiff was illegal, and that upon that branch of the case the question was one of damages only for them to determine. And upon the exception to that instruction and exception to the refusal of the court to charge and submit to the jury, as requested by the defendant's counsel, certain propositions bearing upon the subject arise the main questions presented for consideration. They pertained, not only to the relation of the plaintiff to the premises, but to the persons assuming to act as trustees of the church and to the right of the trustees to assume any control of the parsonage.

Although it was not directly proved that the Spring Valley Church

† For discussion of principles, see Chapin on Torts, § 63 (C).

was a corporation, it may, from what did appear, be inferred and assumed that it was such, as no question was raised to the contrary. The temporalities belonging to the church were under the control of the trustees. Laws of 1813, c. 60, § 4. The parsonage was owned by the Mutual Life Insurance Company, and was held for a parsonage under a demise from that company, and whether it was rented to the trustees or to a society known as the Ladies' Guild was one of the questions upon which evidence was given. While the defendants contended that the church or the trustees of it, as such, were tenants of the insurance company, it was claimed on the part of the plaintiff that such society rented the premises and that it was not within the control of the trustees. If this society could be treated as an independent one, outside of the authority of the church, and the fact as to where the tenancy from the insurance company was located became material, there would, upon the evidence, have been a question for the jury. It is, at least, very questionable whether that society could be treated otherwise than as an instrumentality within the church organization to aid in the accomplishment of its legitimate objects, and for that purpose a mere agency of the religious corporation. In the view taken of the case the determination of that question does not, nor does the official character of those defendants who assumed to act as trustees in what they did, seem to be essential here for consideration.

It sufficiently appears by the record before us to indicate that an unfortunate controversy arose in the church and congregation and that there was a want of that generous Christian spirit which should characterize the action of religious societies. But it is not the province of the court to deal with those considerations. It is the legal aspect only of the situation which can have treatment here.

When the plaintiff went to Spring Valley, pursuant to the direction of the conference to perform the services as minister of the church there, the house was furnished to him as a place of residence. He lawfully went into occupancy of the parsonage. If that occupancy was the actual possession of it by him, at the time of his eviction, the defendants were chargeable with liability for assaulting and forcibly expelling him from the house. And this was so, irrespective of the mere right to the possession, as in that case there was no justification for the application of such force to eject the plaintiff, although the defendants, as trustees, may have had the right to reduce the premises to possession by means of legal process and proceedings. *Parsons v. Brown*, 15 Barb. 590; *Bliss v. Johnson*, 73 N. Y. 529; *McMillan v. Cronin*, 75 N. Y. 474. It is, however, contended on the part of the defendants that the plaintiff was a mere servant of the church and that in that relation only he resided in the house. If that were so, and if the trustees as lessees of the insurance company had the control of the house, the plaintiff had no possession of it, and the trustees had the right to remove him from it and on his refusal to go to use all

the force essential to do so. In such case the possession would be theirs and not his. *Haywood v. Miller*, 3 Hill, 90; *Comstock v. Dodge*, 43 How Prac. 97; *Kerrains v. People*, 60 N. Y. 221, 19 Am. Rep. 158. But it is difficult to see that the relation of master and servant existed between the trustees of the church they represented and the plaintiff. It does not appear that he was hired by that religious corporation, or that it assumed any legal obligation to pay him for his services as minister. He was placed there by the conference pursuant to the regulation and discipline of that church denomination and no contractual relation existed between the Spring Valley church and the plaintiff. *Landers v. F. S. M. E. Church*, 97 N. Y. 120. This church, being subject to such disciplinary regulations, had not within itself legitimately the power to deny to the plaintiff when so stationed there the right to exercise his ministerial duties or to exclude him from its church edifice devoted to that service. *People ex rel. v. Conley*, 42 Hun, 98. This it seems is deemed essential to the maintenance of the system of church government and its integrity. And to assure the application of its property and revenues to the uses of the church and purposes connected with it, the statute has prohibited their diversion to other objects. Laws of 1875, c. 79, § 4. The articles of the discipline of the Methodist Episcopal Church were put in evidence, but are not set forth in the record. It may be assumed that they furnished no aid to the defendants in their bearing upon the relation between the local church and its minister. While the church could not itself, through its own officers exercise power over its minister, it was not without the means of relief from his ministrations when for sufficient cause they should become otherwise than religiously fit for or satisfactory to the congregation. This relief, for some reason of no concern here, was accomplished through the constituted authority. Whether his suspension would effectually result in the severance of the plaintiff's relation as the minister of this church was dependent upon the action of the annual conference, which was then to go into session in the latter part of March. This was the situation at the time of his eviction from the parsonage. It evidently was contemplated that when he ceased to be the minister of the church he would leave the parsonage. But in the occupation of the house his relation was not that of a servant of the church or trustees in the sense sought to be applied, to render him a trespasser on his refusal to leave it. No other relation than that of possession was consistent with the use and enjoyment of it as a parsonage in view of his duties as pastor, which are not supposed to be wholly discharged in the public services at the church. Otherwise, his occupancy and its privileges would be at the will of the trustees and he be liable, or might be subjected to intrusion at their pleasure.

There appears to have been nothing so far as appears in the circumstances under which he went into the house or in his relation to the

church or its trustees, which so qualified his occupancy as to render it otherwise than possession by him. This is presumptively the relation assumed to premises by a party who lawfully enters upon them as a place of abode, and occupies them as such; and any less right than that which possession furnishes is dependent upon some understanding, express or implied, denying such relation. None appears in this case so qualifying the character of the occupancy of the plaintiff. And he had the right to protection against eviction by violence without the aid of legal process. It is unnecessary to consider the question whether he was a tenant at will and entitled to a month's notice, or whether legal proceedings may have been effectually taken with a shorter or without any notice for his removal.

In view of the fact that the plaintiff was in actual possession of the house at the time in question, the use of the force used by the defendants to expel him from the house was without justification.

Whether the plaintiff had established his alleged claim for the conversion of the property was treated as a question of fact, which was submitted to the jury. We do not understand that any question of law was raised by any exception bearing specially upon this branch of the case. Nor is it seen that there was any error in leaving that question to the jury. No other exceptions seem to require consideration. The judgment should be affirmed. All concur except FOLLETT, C. J., dissenting. Judgment affirmed.

4. ENFORCEMENT OF DISCIPLINE⁸

SHEEHAN v. STURGES.

(Supreme Court of Errors of Connecticut, 1885. 53 Conn. 481, 2 Atl. 841.)

Action for assault and battery tried to the court. Finding of facts, with judgment for the defendant. The plaintiff appeals.

GRANGER, J.⁹ This is a complaint for an assault and battery. The defense is that the plaintiff was at the time a pupil in a school kept by the defendant, that he willfully violated the reasonable rules of the school and disobeyed the reasonable commands of the defendant as his teacher, and that for this misconduct the defendant as such teacher whipped him in a reasonable manner. The sole controversy upon the trial was as to the reasonableness of the punishment inflicted. The court found that "such whipping was not unreasonable or excessive and was fully justified by the plaintiff's misconduct at that time."

The extent and reasonableness of the punishment administered by

⁸ For discussion of principles, see Chapin on Torts, § 63 (D).

⁹ A portion of the opinion is omitted.

a teacher to his pupil is purely a question of fact. This is too well settled to make the citation of authorities necessary. The finding of the court therefore settles the question as to this, unless the court acted upon improper evidence.

The plaintiff testified as a witness in his own behalf, and on his cross-examination the defendant, against the objection of the plaintiff's counsel, was allowed to ask him whether on two former occasions, both of them more than a week before the whipping in question, he had not assaulted the teacher while he was chastising him. And the defendant afterwards, in his testimony in his own behalf, was allowed, against the objection of the plaintiff, to state that the plaintiff's conduct in school was habitually bad, and that on two former occasions, one of them about two weeks and the other seven or eight days before the whipping in question, the plaintiff had assaulted him while he was chastising him. The defendant was also allowed, on the plaintiff's cross-examination, against objection, to inquire of him whether he had not, seven or eight days before the whipping in question, put stones in his pocket and declared that he was going to attack the teacher with them. The plaintiff, in answer to the inquiry, denied that he had done so, and the defendant, against the plaintiff's objection, was allowed to show by a witness that the plaintiff had so done. The defendant did not inform the plaintiff at the time of the whipping that he was punishing him for his past and habitual misconduct.

We think the court committed no error in admitting the inquiries and evidence. The right of the schoolmaster to require obedience to reasonable rules and a proper submission to his authority, and to inflict corporal punishment for disobedience, is well settled. * * *

No precise rule can be laid down as to what shall be considered excessive or unreasonable punishment. *Reeve's Dom. Rel.* 288. Each case must depend upon its own circumstances. In *Commonwealth v. Randall*, 4 Gray (Mass.) 36, it is held that, "in inflicting corporal punishment, a teacher must exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, and the age, size, and apparent powers of endurance of the pupil." And we think it equally clear that he should also take into consideration the mental and moral qualities of the pupil, and, as indicative of these, his general behavior in school and his attitude towards his teacher become proper subjects of consideration.

We think therefore that the court acted properly in admitting evidence of the prior and habitual misconduct of the plaintiff, and that it was perfectly proper for the defendant, in chastising him, to consider not merely the immediate offense which had called for the punishment, but the past offenses that aggravated the present one, and showed the plaintiff to have been habitually refractory and disobedient. Nor was it necessary that the teacher should, at the time of inflicting

the punishment, remind the pupil of his past and accumulating offenses. The pupil knew them well enough, without having them brought freshly to his notice.

There is no error. In this opinion the other Judges concurred.

III. False Imprisonment ¹⁰

SIMPSON v. HILL.

(Court of King's Bench, Nisi Prius, 1795. 1 Esp. 431.)

This was an action of assault and false imprisonment.

Plea of the general issue.

The imprisonment complained of was that the defendant sent for a constable, to whom he gave the plaintiff in charge; but the constable never touched the plaintiff, or took her into custody, or used any words expressing that she was a prisoner; for the defendant, on seeing her frightened, said to the constable, that he would not trouble him further at that time; and the constable departed.

Bond, sergeant, for the plaintiff, contended, that this was a coercion of the plaintiff's liberty, by reason of the charge; for that during that interval she could not go where she pleased; and so was an imprisonment, which would support the action.

EYRE, Chief Justice. If the constable, in consequence of the defendant's charge, had for one moment taken possession of the plaintiff's person, it would be, in point of law, an imprisonment; as, for example, if he had tapped her on the shoulder, and said, "You are my prisoner," or if she had submitted herself into his custody, such would be an imprisonment; but the merely giving her in charge, without any taking possession of the person, where nothing more passes than merely the charge, is not, by law, a false imprisonment. And as, in the present instance, the constable did never take her into custody, and the defendant withdrew his charge almost as soon as it was given, such is not, by law, an imprisonment.

PIKE v. HANSON.

(Superior Court of Judicature of New Hampshire, 1838. 9 N. H. 491.)

Trespass, for an assault and false imprisonment on the 1st day of July, A. D. 1837. The action was commenced before a justice of the peace. The defendants pleaded severally the general issue. It appear-

¹⁰ For discussion of principles, see Chapin on Torts, § 64.

ed in evidence that the defendants were selectmen of the town of Madbury for the year 1836; that they assessed a list of taxes upon the inhabitants of said town, among whom was the plaintiff, and committed it to Nathan Brown, collector of said town, for collection. Brown, after having given due notice to the plaintiff, being in a room with her, called upon her to pay the tax, which she declined doing until arrested. He then told her that he arrested her, but did not lay his hand upon her; and thereupon she paid the tax.

Upon this evidence the defendants objected that the action could not be maintained, because there was no assault.

It did not appear that the defendants had been sworn, as directed by the statute of January 4, 1833. A verdict was taken for the plaintiff, subject to the opinion of the court.

WILCOX, J. The statute of January 4, 1833, 2 Laws, p. 99, is imperative in its provisions. It directs that the selectmen or assessors who shall make an appraisal of property for the purposes of taxation shall, before entering upon the duties of their office, take and subscribe an oath in the form prescribed, the tenor of which is that they will make a just and true appraisement of all ratable estate subject to the assessment of public taxes, at its true value in money, according to their best judgment. This provision of the statute cannot be deemed merely directory. It was designed for the protection and security of the citizen whose rights are in some degree in the discretion of the assessors. The legislature intended, by the special oath thus required formally to be taken and subscribed by the assessors, to guard as far as possible against all abuse of this discretion; and we cannot dispense with so important a requisition. We therefore hold that, as the appraisement was made in a manner not authorized by law, all the proceedings of the defendants are void; and they are liable as trespassers for the forcible collection of this tax.

But it is contended that in the present case there has been no assault committed, and no false imprisonment. Bare words will not make an arrest; there must be an actual touching of the body; or, what is tantamount, a power of taking immediate possession of the body, and the party's submission thereto. *Genner v. Sparks*, 1 Salk. 79, 2 Esp. N. P. 374. Where a bailiff, having a writ against a person, met him on horseback, and said to him, "You are my prisoner," upon which he turned back and submitted, this was held to be a good arrest, though the bailiff never laid hand on him. But if, on the bailiff's saying those words he had fled, it had been no arrest, unless the bailiff had laid hold of him. *Homer v. Battyn*, Buller's N. P. 62. The same doctrine is held in other cases. *Russen v. Lucas & al.*, 1 C. & P. 153; *Chinn v. Morris*, 2 C. & P. 361; *Pocock v. Moore, Ryan & Moody*, 321; *Strout v. Gooch*, 8 Greenl. 127; *Bissell v. Gold*, 1 Wend. (N. Y.) 210, 19 Am. Dec. 480.

Where, upon a magistrate's warrant being shown to the plaintiff,

the latter voluntarily and without compulsion attended the constable who had the warrant to the magistrate, it was held there was no sufficient imprisonment to support an action. *Arrowsmith v. Le Mesurier*, 2 N. R. 211. But in this case there was no declaration of any arrest, and the warrant was in fact used only as a summons. And if the decision cannot be sustained upon this distinction, it must be regarded as of doubtful authority.

Starkie says that in ordinary practice words are sufficient to constitute an imprisonment, if they impose a restraint upon the person, and the plaintiff is accordingly restrained; for he is not obliged to incur the risk of personal violence and insult by resisting until actual violence be used. 3 Stark, Ev. 1448. This principle is reasonable in itself, and is fully sustained by the authorities above cited. Nor does it seem necessary that there should be any very formal declaration of an arrest. If the officer goes for the purpose of executing his warrant, has the party in his presence and power, if the party so understands it, and in consequence thereof submits, and the officer, in execution of the warrant, takes the party before a magistrate, or receives money or property in discharge of his person, we think it is in law an arrest, although he did not touch any part of the body.

In the case at bar, it clearly appears that the plaintiff did not intend to pay the tax, unless compelled by an arrest of her person. The collector was so informed. He then proceeded to enforce the collection of the tax—declared that he arrested her—and she, under that restraint, paid the money. This is a sufficient arrest and imprisonment to sustain the action, and there must, therefore, be

Judgment on the verdict.

BIRD v. JONES.

(Court of King's Bench, 1845. 7 Q. B. 742.)

This action was tried before Lord Denman, C. J., and a verdict was found for the plaintiff. A rule nisi for a new trial was obtained on the ground of misdirection.

COLERIDGE, J. In this case, in which we have unfortunately been unable to agree in our judgment, I am now to pronounce the opinion which I have formed; and I shall be able to do so very briefly, because, having had the opportunity of reading a judgment prepared by my Brother PATTESON, and entirely agreeing with it, I may content myself with referring to the statement he has made in detail of those preliminary points in which we all, I believe, agree, and which bring the case up to that point upon which its decision must certainly turn, and with regard to which our difference exists. This point is whether certain facts, which may be taken as clear upon the evidence, amount to an imprisonment. These facts, stated shortly and as I understand them, are, in effect, as follows:

A part of a public highway was inclosed, and appropriated for spectators of a boat race, paying a price for their seats. The plaintiff was desirous of entering this part, and was opposed by the defendant; but, after a struggle, during which no momentary detention of his person took place, he succeeded in climbing over the inclosure. Two policemen were then stationed by the defendant to prevent, and they did prevent, him from passing onwards in the direction in which he declared his wish to go; but he was allowed to remain unmolested where he was, and was at liberty to go, and was told that he was so, in the only other direction by which he could pass. This he refused for some time, and, during that time, remained where he had thus placed himself.

These are the facts, and, setting aside those which do not properly bear on the question now at issue, there will remain these: That the plaintiff, being in a public highway and desirous of passing along it, in a particular direction, is prevented from doing so by the orders of the defendant, and that the defendant's agents for the purpose are policemen, from whom, indeed, no unnecessary violence was to be anticipated, or such as they believed unlawful, yet who might be expected to execute such commands as they deemed lawful, with all necessary force, however resisted. But, although thus obstructed, the plaintiff was at liberty to move his person, and go in any other direction, at his free will and pleasure, and no actual force or restraint on his person was used, unless the obstruction before mentioned amounts to so much. I lay out of consideration the question of right or wrong between these parties. The acts will amount to imprisonment, neither more nor less, from their being wrongful or capable of justification. And I am of opinion that there was no imprisonment. To call it so appears to me to confound partial obstruction and disturbance with total obstruction and detention. A prison may have its boundary, large or narrow, visible and tangible, or, though real, still in the conception only; it may itself be movable or fixed; but a boundary it must have, and that boundary the party imprisoned must be prevented from passing. He must be prevented from leaving that place, within the ambit of which the party imprisoning would confine him, except by prison-breach. Some confusion seems to me to arise from confounding imprisonment of the body with mere loss of freedom. It is one part of the definition of freedom to be able to go whithersoever one pleases. But imprisonment is something more than the mere loss of this power. It includes the notion of restraint within some limits defined by a will or power exterior to our own.

In Com. Dig. "Imprisonment," (G,) it is said: "Every restraint of the liberty of a freeman will be an imprisonment." For this the authorities cited are 2 Inst. 482; Hobert & Stroud's Case, Cro. Car. 210. But, when these are referred to, it will be seen that nothing was intended at all inconsistent with what I have ventured to lay down above. In both books, the object was to point out that a prison was

not necessarily what is commonly so called,—a place locally defined and appointed for the reception of prisoners. Lord Coke is commenting on the statute of Westminster 2d (1 St. 13 Edw. I. c. 48), “in prisona,” and says: “Every restraint of the liberty of a freeman is an imprisonment, although he be not within the walls of any common prison.” The passage in *Cro. Car.* is from a curious case of an information against Sir Miles Hobert and Mr. Stroud for escaping out of the Gate-House Prison, to which they had been committed by the king. The question was whether, under the circumstances, they had ever been there imprisoned. Owing to the sickness in London, and through the favor of the keeper, these gentlemen had not, except on one occasion, ever been within the walls of the Gate-House. The occasion is somewhat singularly expressed in the decision of the court, which was “that their voluntary retirement to the close stool” in the Gate-House “made them to be prisoners.” The resolution, however, in question is this: “That the prison of the king’s bench is not any local prison, confined only to one place, and that every place where any person is restrained of his liberty is a prison; as if one take sanctuary, and depart thence, he shall be said to break prison.”

On a case of this sort, which, if there be difficulty in it, is at least purely elementary, it is not easy nor necessary to enlarge; and I am unwilling to put any extreme case hypothetically; but I wish to meet one suggestion, which has been put as avoiding one of the difficulties which cases of this sort might seem to suggest. If it be said that to hold the present case to amount to an imprisonment would turn every obstruction of the exercise of a right of way into an imprisonment, the answer is that there must be something like personal menace or force accompanying the act of obstruction, and that, with this, it will amount to imprisonment. I apprehend that is not so. If, in the course of a night, both ends of a street were walled up, and there was no egress from the house but into the street, I should have no difficulty in saying that the inhabitants were thereby imprisoned; but if only one end were walled up, and an armed force stationed outside to prevent any scaling of the wall or passage that way, I should feel equally clear that there was no imprisonment. If there were, the street would obviously be the prison; and yet, as obviously, none would be confined in it.

Knowing that my lord has entertained strongly an opinion directly contrary to this, I am under serious apprehension that I overlook some difficulty in forming my own; but, if it exists, I have not been able to discover it, and am therefore bound to state that, according to my view of the case, the rule should be absolute for a new trial. * * *

LORD DENMAN, C. J. I have not drawn up a formal judgment in this case, because I hoped to the last that the arguments which my learned Brothers would produce in support of their opinion might alter mine. We have freely discussed the matter, both orally and in written communication; but, after hearing what they have advanced, I am compelled to say that my first impression remains. If, as I must

believe, it is a wrong one, it may be in some measure accounted for by the circumstances attending the case. A company unlawfully obstructed a public way for their own profit, extorting money from passengers, and hiring policemen to effect this purpose. The plaintiff, wishing to exercise his right of way, is stopped by force, and ordered to move in a direction which he wished not to take. He is told at the same time that a force is at hand ready to compel his submission. That proceeding appears to me equivalent to being pulled by the collar out of one line into another. There is some difficulty perhaps, in defining "imprisonment" in the abstract, without reference to its illegality; nor is it necessary for me to do so, because I consider these acts as amounting to imprisonment. That word I understand to mean any restraint of the person by force. In Buller's *Nisi Prius* (page 22) it is said: "Every restraint of a man's liberty under the custody of another, either in a jail, house, stocks, or in the street, is in law an imprisonment; and whenever it is done without a proper authority, is false imprisonment, for which the law gives an action; and this is commonly joined to assault and battery; for every imprisonment includes a battery and every battery an assault." It appears, therefore, that the technical language has received a very large construction, and that there need not be any touching of the person. A locking up would constitute an imprisonment without touching. From the language of Thorpe, C. J., which Mr. Selwyn (volume II, p. 915 [11th Ed.] tit. Imprisonment) cites from the Book of Assizes (22 Ass. fol. 104, B, pl. 85), it appears that, even in very early times, restraint of liberty by force was understood to be the reasonable definition of imprisonment. I had no idea that any person in these times supposed any particular boundary to be necessary to constitute imprisonment, or that the restraint of a man's person from doing what he desires ceases to be an imprisonment because he may find some means of escape. It is said that the party here was at liberty to go in another direction. I am not sure that in fact he was, because the same unlawful power which prevented him from taking one course might, in case of acquiescence, have refused him any other. But this liberty to do something else does not appear to me to affect the question of imprisonment. As long as I am prevented from doing what I have a right to do, of what importance is it that I am permitted to do something else? How does the imposition of an unlawful condition show that I am not restrained? If I am locked in a room, am I not imprisoned because I might effect my escape through a window, or because I might find an exit dangerous or inconvenient to myself, as by wading through water, or by taking a route so circuitous that my necessary affairs would suffer by delay? It appears to me that this is a total deprivation of liberty with reference to the purpose for which he lawfully wished to employ his liberty; and, being effected by force, it is not the mere obstruction of a way, but a restraint of the person. The case cited as occurring before Lord Chief Justice Tindal, as I understand it, is much in point.

He held it an imprisonment where the defendant stopped the plaintiff on his road till he had read a libel to him, yet he did not prevent his escaping in another direction. It said that, if any damage arises from such obstruction, a special action on the case may be brought. Must I then sue out a new writ, stating that the defendant employed direct force to prevent my going where my business called me, whereby I sustained loss? And, if I do, is it certain that I shall not be told that I have misconceived my remedy, for all flows from the false imprisonment, and that should have been the subject of an action of trespass and assault? For the jury properly found that the whole of the defendant's conduct was continuous; it commenced in illegality; and the plaintiff did right to resist it as an outrageous violation of the liberty of the subject from the very first.

Rule absolute.¹¹

1. ARREST WITHOUT WARRANT

(A) *For Misdemeanor*¹²

YATES v. STATE.

(Supreme Court of Georgia, 1907. 127 Ga. 813, 56 S. E. 1017, 9 Ann. Cas. 620.)

COBB, P. J.¹³ Yates was tried under an indictment charging him with the murder of Freeman, and was convicted of voluntary manslaughter. It appeared from the evidence that Freeman was the town marshal of Donalsonville, and the homicide occurred while he, with two other persons whom he had asked to accompany him, was attempting, without a warrant, to arrest the accused for a violation of a town ordinance committed in his presence some months before. The accused made a motion for a new trial which was refused, and he accepted. * * *

Error was assigned because the court instructed the jury that if they believed from the evidence that, on a prior occasion the accused had, in the presence of the deceased, who was the town marshal of Donalsonville, violated an ordinance of that town "then the officer would have a right under the law to arrest him without a warrant, and if he was attempting to arrest him for a violation of a town ordinance which had been committed in his presence, that would be a legal arrest, and the defendant would have no right to resist the officer in making the arrest;

¹¹ Williams and Patteson, JJ., concurred with Coleridge, J. Their opinions are omitted.

¹² For discussion of principles, see Chapin on Torts, § 65.

¹³ A portion of the opinion is omitted.

and if he did so, and in doing so took the life of the deceased, in order to prevent a legal arrest, then it would not be manslaughter, it would be murder." The distinction which has come down to us from the common law between arrests, without a warrant, for felonies and such arrests for minor offenses has been fully discussed and clearly pointed out by Mr. Justice Evans in *Porter v. State*, 124 Ga. 297, 52 S. E. 283, 2 L. R. A. (N. S.) 730, and need not be further discussed here.

We are here dealing with the question of the authority of a municipal peace officer to arrest, without a warrant, for a mere municipal offense which though committed in his presence was perpetrated months before the attempt to arrest was made. It was held by the majority of the court in the case cited that section 896 of our Penal Code is applicable to municipal peace officers, such as policemen or town marshals. That section reads as follows: "An arrest may be made for a crime by an officer either under a warrant or without a warrant, if the offense is committed in his presence or the offender is endeavoring to escape or for other cause there is likely to be a failure of justice for want of an officer to issue a warrant." As stated by Mr. Justice Evans, in the majority opinion in the *Porter Case*: "Section 896 of our Penal Code is a codification of the common law on the subject of arrest, with perhaps a slight enlargement of the power of arrest." "Though at common law an officer might without a warrant arrest for a breach of the peace committed in his view, the arrest must have been made at the time of or within a reasonable time after the commission of the offense—that is, the officer must immediately set about the arrest and follow up the effort, until the arrest is made. There must be a continued pursuit and no cessation of acts tending toward the arrest from the time of the commission of the offense until the apprehension of the offender. Any delay for purposes foreign to the arrest will make the officer a trespasser." *Voorhees on Arrest*, § 141; *Hawley, Law of Arrest*, 39; *Regina v. Walker*, 25 Eng. Law & Eq. R. 589; *Clifford v. Brandon*, 2 Campb. 358; *Cook v. Nethercote*, 6 C. & P. 741; *Coupey v. Henley*, 2 Esp. 540; *Taylor v. Strong*, 3 Wend. (N. Y.) 385; *Wahl v. Walton*, 30 Minn. 506, 16 N. W. 397. A statute of Minnesota provided that a peace officer might without a warrant arrest a person under prescribed conditions set forth in subdivisions of the statute, the first of which provided that the officer might so arrest "for a public offense committed or attempted in his presence." In *Wahl v. Walton*, *supra*, *Gilfillan, C. J.*, after stating that, "At the common law, a constable might, without a warrant, arrest for a breach of the peace committed in his view" (for which he cited 4 Bl. Com. 292), and that "it was well settled that in case of an offense not a felony the arrest must have been made at the time of or within a reasonable time after its commission," and citing English authorities, said: "The statute seems to be a re-enactment of the common-law rule, with this change, that the first subdivision enlarges

the class of cases in which a peace officer may arrest where the offense is committed in his presence, so that such arrest may be made for any public offense—felony or misdemeanor—though not amounting to a breach of the peace. But there is no reason to suppose that it was intended to change in any other respect the conditions upon which the arrest may be made.” He further says: “When it is said that the arrest must be made at the time or immediately after the offense, reference is had, not merely to time, but rather to sequence of events. The officer may not be able at the exact time, to make the arrest; he may be opposed by friends of the offender; may find it necessary to procure assistance; considerable time may be employed in the pursuit. The officer must at once set about the arrest, and follow up the effort until the arrest is effected. * * * In this case, some five hours having elapsed between what occurred at noon and the arrest, during which the defendant (arresting officer) was not about anything connected with the arrest, the court was right in its instruction that there was no authority to arrest for that occurrence.” In *Meyer v. Clark*, 41 N. Y. Super. Ct. 107, it was held, “When a policeman, after having seen a breach of the peace or a misdemeanor committed, departs, and afterwards returns, he cannot arrest without a warrant for such previous offense so committed in his view,” and that the shortness of the interval does not affect the question. In *Regina v. Walker*, *supra*, some two hours had elapsed after the commission of the offense before the arrest was made, and it was held that the authority to arrest was lost, because there was no continued pursuit. In the case with which we are dealing, about four months had elapsed from the time the offense was committed in the presence of the town marshal until he, without a warrant, made this attempt to arrest the offender. So there can be no doubt that he was illegally attempting to arrest the accused. * * * Judgment reversed. All the Justices concur, except FISH, C. J., absent.

(B) *For Felony*¹⁴

BECKWITH v. PHILBY et al.

(Court of King's Bench, 1827. 6 Barn. & C. 635, 108 Reprint, 585, 30 R. R. 484.)

This was an action for assaulting, beating, handcuffing, and imprisoning the plaintiff, and keeping and detaining him handcuffed and imprisoned, without any reasonable or probable cause for forty-eight hours, on a false and pretended charge of felony. At the trial the following appeared to be the facts of the case:

¹⁴ For discussion of principles, see Chapin on Torts, § 65.

The plaintiff was a blacksmith residing at Waltham Cross, in the county of Hertford. The defendant Philby was high constable of Ongar in Essex, and resided at Loughton, in that county. The defendants Wilks and Spicer were constables of that parish. The plaintiff, on the 31st of January, 1826, with a bridle and saddle on his back, was returning from Romford market, where he had sold a pony for £7. 10 s., and about half past six in the evening sat down to rest himself near Loughton Bridge. While he was sitting there, one Gould, a farmer resident in the neighborhood, passed him. Gould told Philby the circumstance, and said he thought he ought to look after the man. Philby went out and asked the plaintiff several questions, to which he gave such answers as induced Philby to think he had been stealing a horse, or was about to do so. The plaintiff was searched, and was again asked by Philby where he came from; the plaintiff then said that he had come from Cheshunt, and had been to Romford to sell a horse, that his name was Beckwith, and he had got the horse of one Bartlett. He then referred Philby to one Noble, who lived in the neighborhood. No inquiry was made by Philby of Noble that night. Philby then sent for the defendant Wilks, to take the plaintiff to the watch-house, and on Wilks' arrival desired him to handcuff the plaintiff, which was done. Wilks took him, at his own request, to a public-house at Loughton, and he remained there handcuffed during the night. On the following morning Wilks delivered the plaintiff to the custody of Spicer, who took him to a magistrate, who examined him, and said he thought it his duty to detain him, but that if there was anybody near who would be bound for his appearance, he might go home to his family. Noble became bound for the plaintiff's appearance, and he was then discharged. Philby was present at this examination. On inquiry at Cheshunt it appeared that the plaintiff had bought a horse of Bartlett, as he had stated, and nothing subsequently appeared against his character. No horse had been stolen in or near Loughton on the day, or for some days before the plaintiff was apprehended, but within the preceding month many had been stolen.

For the plaintiff it was contended that there was no charge of felony made, nor any felony committed, the defendant Philby was not justified in making the arrest in the first instance, and still less were he and the other defendants justified in detaining the plaintiff during the night. The learned judge was of opinion that the arrest and detention were lawful, provided the defendants had reasonable cause to suspect that the plaintiff had committed the felony, and he directed the jury to find a verdict for the defendants, if they thought upon the whole evidence that the defendants had reasonable cause for suspecting the plaintiff of felony. A verdict was found for the defendants, but liberty was reserved to the plaintiff to move to enter a verdict for nominal damages, if the Court should be of opinion that the arrest and detention were unlawful.

Gurney now moved to enter a verdict for the plaintiff for nominal damages, on the ground that a constable had no authority without a warrant to apprehend a person unless there was a charge of felony made by a third person, or unless a felony had been committed. A constable, acting on his own suspicion, places himself in the situation of a private person. The latter cannot lawfully arrest another unless a felony has actually been committed and then it must be on his own suspicion and not on report or suspicion of another. When a felony has been committed by some one, a constable may, upon the information of others, lawfully apprehend a supposed offender without any knowledge of the circumstances on which a suspicion is founded. But if he act without having information from others and on his own suspicion, then he in the same manner as a private individual must be liable to an action if it afterwards appear that no felony has been committed.

Lord TENTERDON, C. J.¹⁵ I am of opinion that there is no ground for disturbing the verdict. Whether there was any reasonable cause for suspecting that the plaintiff had committed a felony, or was about to commit one, or whether he had been detained in custody an unreasonable time, were questions of fact for the jury, which they have decided against the plaintiff, and in my judgment most correctly. The only question of law in the case is whether a constable having reasonable cause to suspect that a person has committed a felony may detain such person until he can be brought before a justice of the peace to have his conduct investigated. There is this distinction between a private individual and a constable; in order to justify the former in causing the imprisonment of a person, he must not only make out a reasonable ground of suspicion but he must prove that a felony has actually been committed; whereas a constable having reasonable ground to suspect that a felony had been committed, is authorized to detain the party suspected until inquiry can be made by the proper authorities. Now in this case it is quite clear upon the evidence, and the jury have so found that the conduct of the plaintiff had given the defendants just cause for suspecting that he either had committed or was about to commit a felony, and the jury having so found, I am of opinion that the action was not maintainable.

Rule refused.

MORLEY v. CHASE.

(Supreme Judicial Court of Massachusetts, 1887. 143 Mass. 396, 9 N. E. 767.)

Tort for an assault and false imprisonment. Trial in the Superior Court, before Thompson, J., who allowed a bill of exceptions, in substance as follows:

¹⁵ The statement of facts is abridged.

It appeared that on May 27, 1884, at about half past one o'clock p. m., a constable duly attached, on civil process, certain personal property of the defendant in the defendant's bakeshop and duly deputed the plaintiff as keeper thereof in said shop.

The defendant's daughter, sixteen years of age, was attending said shop at the time, and in half an hour another older girl employed in said shop came in and remained there.

The evidence was conflicting as to whether the girls or either of them were informed or knew that an attachment had been made, or as to the authority, object or purpose of the constable or keeper, the girls denying having had any such information or knowledge, and the constable and the plaintiff testifying that they duly and fully informed said girls of the attachment and showed to them the paper deputing him as keeper.

It further appeared that at about half past four o'clock p. m. the defendant came into his shop and found there the plaintiff and said girls.

The defendant offered evidence tending to prove that he then had no knowledge or information as to the attachment or the authority of the plaintiff; that immediately upon his coming into his shop his daughter said to him, "This man has taken money from the drawer and has pushed me;" that thereupon the defendant told the plaintiff to restore the money; that the plaintiff made no reply; that then the defendant seized the plaintiff, pushed him against the partition and held him there some minutes until a policeman came in and took the plaintiff away from the shop; that the plaintiff made no statement and gave no information as to the attachment, or his authority; and that the defendant neither knew nor suspected either.

The plaintiff offered evidence tending to prove that immediately upon the defendant entering the shop, the plaintiff fully informed him of the attachment, and of his authority as keeper, and that the defendant fully understood both, before making the assault complained of. He also described the assault as very violent and unreasonable.

The judge instructed the jury that, the plaintiff being rightfully in said shop and his doings there being legal, the defendant, not being an officer, had no right to arrest or lay violent hands on him, though the defendant had reasonable cause to believe that the plaintiff had committed a felony, unless by some fault or improper omission on the plaintiff's part the plaintiff contributed to induce such belief; that the defendant, if he was led to believe that the plaintiff had wrongfully taken money from his drawer by the conduct of the plaintiff and his failure to notify the defendant of his business in his shop, would be justified in forcibly restraining the plaintiff and endeavoring to obtain the money which he believed had been wrongfully taken from the drawer, although in fact no money had been wrongfully taken therefrom; and that in determining whether or not the defendant believed

that the plaintiff had wrongfully taken money from the drawer the jury were to take into consideration all the circumstances bearing upon the conduct of both the plaintiff and the defendant upon that occasion.

At the close of the charge, the defendant requested the judge further to instruct the jury that if the girl notified her father as above stated, in the hearing of the plaintiff and the plaintiff with the opportunity so to do, neglected to explain to the defendant, such neglect may have justified the defendant in arresting him. The judge refused so to rule.

The jury returned a verdict for the plaintiff; and the defendant alleged exceptions.

FIELD, J. In *Rohan v. Sawin*, 5 Cush. 281, 285, it is said in reference to felonies: "As to the right appertaining to private individuals to arrest without a warrant, it is a much more restricted authority, and is confined to cases of the actual guilt of the party arrested; and the arrest can only be justified by proving such guilt." See, also, *Commonwealth v. Carey*, 12 Cush. 246, 251.

The rule by some other courts has been stated to be that a private person can only justify for an arrest without a warrant, on suspicion of felony, by proving that a felony has actually been committed, and that he has probable cause for believing that the person arrested was the person who committed it. *Allen v. Wright*, 8 C. & P. 522; *Reuck v. McGregor*, 32 N. J. Law, 70; *Brockway v. Crawford*, 48 N. C. 433, 67 Am. Dec. 250; *Holley v. Mix*, 3 Wend. (N. Y.) 350, 20 Am. Dec. 702; *Teagarden v. Graham*, 31 Ind. 422.

Under either view of the law, the instructions given were sufficiently favorable to the defendant. If no felony had been committed, it is difficult to see what defense the defendant had. The request was for a ruling upon the effect of specific testimony when there was other evidence relevant to the same point and the instructions given covered the whole subject; and the request omits the important qualification that the defendant must have believed from what his daughter told him that the plaintiff had wrongfully taken money from the drawer. It was rightly refused.

Exceptions overruled.

INJURIES TO REPUTATION—DEFAMATION

I. Publication ¹

SHEFFILL v. VAN DEUSEN.

(Supreme Judicial Court of Massachusetts, 1859. 13 Gray, 304,
74 Am. Dec. 632.)

Action of tort for slander. Trial in the court of common pleas, before Briggs, J., who signed this bill of exceptions: "The words claimed to have been slanderous, were spoken, if at all, at the dwelling house of the defendants and at that part called the bakery, where bread and other articles were sold to customers; and were spoken by Mrs. Van Deusen to Mrs. Sheffill. The defendants asked the court to instruct the jury that if the words alleged in the plaintiffs' declaration were spoken to Mrs. Sheffill, and no other person but Mrs. Sheffill and Mrs. Van Deusen were present, there was no such publication of the words as would maintain the action. The court declined so to instruct, but did instruct the jury that, if the words were publicly uttered in the bakery of the defendants, there was a sufficient publication, though the plaintiff has not shewn that any other person was present, at the time they were spoken, but Mrs. Sheffill and Mrs. Van Deusen. The jury returned a verdict for the plaintiffs, and the defendants except."

BIGELOW, J.² Proof of the publication of the defamatory words alleged in the declaration was essential to the maintenance of this action. Slander consists in uttering words to the injury of a person's reputation. No such injury is done when the words are uttered only to the person concerning whom they are spoken, no one else being present or within hearing. It is damage done to character in the opinion of other men, and not in a party's self estimation, which constitutes the material element in an action for verbal slander. Even in a civil action for libel, evidence that the defendant wrote and sent a sealed letter to the plaintiff, containing defamatory matter, was held insufficient proof of publication, although it would be otherwise in an indictment for libel, because such writings tend directly to a breach of the peace. * * *

It is quite immaterial in the present case that the words were spoken in a public place. The real question for the jury was, were they so spoken as to have been heard by a third person? The defendants were therefore entitled to the instructions for which they asked.

Exceptions sustained.

¹ For discussion of principles, see Chapin on Torts, §§ 68-74.

² A portion of the opinion is omitted.

OWEN v. OGILVIE PUB. CO.

(Supreme Court of New York, Appellate Division, Second Department, 1898.
32 App. Div. 465, 53 N. Y. Supp. 1033.)

HATCH, J. Action to recover damages for an alleged libel claimed to have been published by the defendant, a corporation. The act complained of was committed by the defendant's general manager. The libel consisted in the dictation of a letter by the defendant's general manager to a young lady employed by the corporation as a stenographer and typewriter in the private office of the general manager. The letter was written in reference to the business of the corporation and had relation to a small sum of money missing from the cash drawer, and the letter expressed a suspicion that the money had been taken by the plaintiff, during her employment by the defendant, on the day before.

The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and delivered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. *Youmans v. Smith*, 153 N. Y. 214, 47 N. E. 265. Has such rule application to the facts of this case? The letter was dictated to the stenographer, and was by her copied out, was signed by the manager, was then inclosed in an envelope, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writ-

ing and the copying were but parts of one act; i. e. the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act. We do not deny but that there can be publication of a libel by a corporation by reading the libelous matter to a servant of such corporation, or delivering it to be read. Where the duties devolved upon such servant are distinct and independent of the process by which the libel was produced, he might well stand in the attitude of a third person through which a libel can be published. But such rule may not be applied where the acts of the servants are so intimately related to each other as is disclosed in the present record and the production is the joint act of both. As there was no other proof of publication aside from the reading by the stenographer, it is insufficient to uphold a finding that the libel was published. Nothing in *Kiene v. Ruff*, 1 Iowa, 482, conflicts with this view. That case presented the ordinary question of delivery, by the person writing the libel, of the libelous matter to a third person to transcribe the same. The delivery for that purpose was held sufficient to constitute a publication where such person actually transcribed the matter and forwarded the letter. Substantially similar doctrine is contained in *Snyder v. Andrews*, 6 Barb. 43. Such rule is not questioned, but the particular facts of this case remove it from its operation.

It follows that the judgment should be reversed and a new trial granted, costs to abide the event. All concurred, except *WOODWARD, J.*, who was absent. Judgment and order reversed and a new trial granted, costs to abide the event.

II. Construction of Language ³

HANKINSON v. BILBY.

(Court of Exchequer, 1847. 16 Mees. & W. 442, 73 R. R. 563.)

Case.⁴ The declaration stated with proper innuendoes that the defendant falsely and maliciously spoke and published of the plaintiff the following defamatory words: "You are a thief, and a bloody thief.

³ For discussion of principles, see Chapin on Torts, §§ 68-74.

⁴ The statement of the case and argument of the counsel are abridged.

"You get your living by it. You have robbed Mr. Lake of £30, and would have robbed him of more, only you were afraid. I did mean what I said; be off, I don't want any bloody thieves here. You know you robbed Mr. Lake of £30."

At the trial, under a plea of Not guilty, before Rolfe, B., it appeared that the words were uttered by the defendant, a toll collector, to the plaintiff, as he passed the turnpike gate, in the presence of several persons as well as the witness. The nature of the previous conversation between the plaintiff and defendant did not appear. The learned Baron told the jury, that it was immaterial whether the defendant intended to convey a charge of felony against the plaintiff by the words used, the question being, whether the bystanders would understand that charge to be conveyed by them. Verdict for the plaintiff for £5.

Humfrey now moved for a new trial, on the ground of misdirection: No special damage being laid, it was necessary to show the words to be actionable in themselves. The witness called by the plaintiff to prove the words was purposely selected, he not having heard the previous conversation between the plaintiff and defendant. * * *

PARKE, B. The witness appears to have been well acquainted with the affair to which the words related. If the bystanders were equally cognizant of it, the defendant would have been entitled to a verdict; but here the only question is, whether the private intention of a man who utters injurious words is material, if bystanders may fairly understand them in a sense and manner injurious to the party to whom they relate, e. g. that he was a felon.

Some doubt being suggested as to the facts proved, the court conferred with ROLFE, B.; and the next day,

POLLOCK, C. B., said: We find from my Brother ROLFE that there were several bystanders who not only might but must have heard the expressions which form the subject of this action. That disposes of the case as to the matter of law. Words uttered must be construed in the sense which hearers of common and reasonable understanding would ascribe to them, even though particular individuals better informed on the matter alluded to might form a different judgment on the subject.

Rule refused.

III. Matter Defamatory Per Se

1. IMPUTATION OF CRIME⁵

WEBB v. BEAVAN.

(Queen's Bench Division, 1883, 11 Q. B. Div. 609.)

Demurrer to a statement of claim which alleged that the defendant falsely and maliciously spoke and published of the plaintiff the words following: "I will lock you" (meaning the plaintiff) "up in Gloucester Gaol next week. I know enough to put you" (meaning the plaintiff) "there" (meaning thereby that the plaintiff had been and was guilty of having committed some criminal offence or offences). The plaintiff claimed £500 damages.

Demurrer, on the ground that the statement of claim did not allege circumstances shewing that the defendant had spoken or published of the plaintiff any actionable language, and that no cause of action was disclosed. Joinder in demurrer.

W. H. Nash, in support of the demurrer, contended that, in order to make the words actionable, the innuendo should have alleged that they imputed an offence for which the plaintiff could have been indicted, and that it was not sufficient to allege that they imputed a criminal offence merely. He referred to *Odgers on Libel and Slander*, p. 54.

Hammond Chambers, contra, contended that, according to the earlier authorities, the test, in ascertaining whether words were actionable per se, was whether the offence imputed was punishable corporally or by fine, and that it was not necessary to allege that the words imputed an indictable offence. He cited *Com. Dig. tit. Action on the Case for Defamation*, D. 5 and 9; *Curtis v. Curtis*, 10 Bing. 477.

POLLOCK, B. I am of opinion that the demurrer should be overruled. The expression "indictable offence" seems to have crept into the text-books, but I think the passages in *Comyns' Digest* are conclusive to shew that words which impute any criminal offence are actionable per se. The distinction seems a natural one, that words imputing that the plaintiff has rendered himself liable to the mere infliction of a fine are not slanderous, but that it is slanderous to say that he has done something for which he can be made to suffer corporally.

LOPES, J. I am of the same opinion. I think it is enough to allege that the words complained of impute a criminal offence. A great num-

⁵ For discussion of principles, see Chapin on Torts, §§ 6S-71.

ber of offences which were dealt with by indictment twenty years ago are now disposed of summarily, but the effect cannot be to alter the law with respect to actions for slander.

Demurrer overruled.

BROOKER v. COFFIN.

(Supreme Court of Judicature of New York, 1809. 5 Johns. 188,
4 Am. Dec. 337.)

Action for slander.

SPENCER, J.⁶ The first count is for these words, "She is a common prostitute, and I can prove it;" and the question arises, whether speaking these words gives an action, without alleging special damages. By the statute (1 Rev. Laws 1813, p. 114) common prostitutes are adjudged disorderly persons, and are liable to commitment, by any justice of the peace, upon conviction, to the Bridewell or House of Correction, to be kept at hard labor for a period not exceeding 60 days, or until the next General Sessions of the Peace. It has been supposed that, therefore, to charge a woman with being a common prostitute was charging her with such an offense as would give an action for slander.

The same statute which authorizes the infliction of imprisonment on common prostitutes or disorderly persons, inflicts the same punishment for a great variety of acts, the commission of which renders the persons liable to be considered disorderly; and to sustain this action would be going the whole length of saying, that every one charged with any of the acts prohibited by that statute, would be entitled to maintain an action for defamation. Among others, to charge a person with pretending to have skill in physiognomy, palmistry, or pretending to tell fortunes, would, if this action is sustained, be actionable. Upon the fullest consideration we are inclined to adopt this as the safest rule, and one which, as we think, is warranted by the cases. In case the charge, if true, will subject the party charged to an indictment for a crime involving moral turpitude, or subject him to an infamous punishment, then the words will be in themselves actionable; and Baron Comyns considers the test to be, whether the crime is indictable or not. 1 Com. tit. Action on the Case for Defamation, F, 20. There is not, perhaps, so much uncertainty in the law upon any subject, as when words shall be in themselves actionable. From the contradiction of cases, and the uncertainty prevailing on this head, the court think they may, without overleaping the bounds of their duty, lay down a rule which will conduce to certainty, and they, therefore, adopt the rule I have mentioned as the criterion. In our opinion, therefore, the first count in the declaration is defective. * * *

The defendant must, therefore, have judgment.

⁶ The statement of facts and a portion of the opinion are omitted.

FANNING v. CHACE.

(Supreme Court of Rhode Island, 1891. 17 R. I. 388, 22 Atl. 275, 13 L. R. A. 134, 33 Am. St. Rep. 878.)

TILLINGHAST, J. This is an action of trespass on the case for slander. The declaration, to which the defendant demurs, sets out that the plaintiff is a licensed retail liquor dealer in the city of Providence, and has been such for a long time. That, anticipating a renewal of his license for the year 1890-91, he made large purchases of liquor in advance, and also refitted and refurnished his saloon at large expense. That the defendant, well knowing the premises, but intending to injure him, the plaintiff, and prevent him from again procuring a license for the carrying on of his said business, in the presence and hearing of divers good citizens, uttered, declared, and published the following false, scandalous, and malicious words of and concerning the plaintiff, viz.: "He [meaning the plaintiff] is going to start a house of ill fame, [meaning a house to be kept for the purposes of prostitution], so sign a protest against him [meaning the plaintiff]"—meaning and intending thereby that said plaintiff was going to start a house to be kept and maintained for the purposes of prostitution; and that said plaintiff ought not to be granted a license to carry on the business of retail liquor dealer as he desired, in accordance with his application on file in the office of the license commissioners in said city, and to therefore sign a written remonstrance protesting that said plaintiff ought to be refused a license, which said defendant then and there presented to said people. The declaration further sets out that, in consequence of the uttering and publishing of said words by the defendant, the majority of persons owning the greater part of the land within 200 feet of the said saloon, or who were occupants of it, signed a remonstrance protesting that license should not be granted to the plaintiff to carry on said business, whereupon said license commissioners refused to grant such license, and were rendered unable to grant the same; and alleging special damage.

The principal ground urged in support of the demurrer is that the words complained of, since they do not amount to an imputation of the commission of an offense, but only to a charge of an intention to commit one, are not actionable either per se, or from having caused special damage. The main question raised by the demurrer therefore is this, viz.: Are words actionable which merely impute a criminal intention to another? We think this question must be answered in the negative. Words which falsely charge a person with the commission of a criminal offense are actionable upon the familiar ground that they may endanger him by subjecting him to the penalties of the law, and render him infamous in the community. But the charge, in order to be obnoxious to the law, must be an offense actually committed or attempted—a punishable offense—and not of an offense existing in contempla-

tion or intention merely; for the law does not take cognizance of one's intentions merely, however malicious or wicked they may be, but only takes cognizance thereof when coupled with and giving significance to his acts. So that, in order to render one's intent of any importance in the eye of the law, it must be combined with his act. It therefore follows that, as mere intent to commit a crime is not a violation of the law, and hence not punishable, to accuse one of having such an intent is not to accuse him of any crime or offense. The language which the plaintiff complains of as being slanderous is this: "He is going to start a house of ill fame." This language, if indeed it is anything more than the expression of an opinion on the part of the defendant, does not amount to a charge of any crime or offense, or even of an attempt to commit one. That such a charge is not actionable is one of the few things in the law of slander which is evidently settled beyond controversy. The law upon this point is well stated in the American Encyclopædia of Law (volume 13, p. 353) as follows: "Words which merely impute a criminal intention, not yet put into action, are not actionable. Guilty thoughts are not a crime. But as soon as any step is taken to carry out such intention, as soon as any overt act is done, an attempt to commit a crime has been made; and every attempt to commit an indictable offense is, at common law, a misdemeanor, and in itself indictable. To impute such an attempt is, therefore, clearly actionable." In *Cornelius v. Van Slyck*, 21 Wend. (N. Y.) 70, 71, the court, in speaking of the sense in which the words should be taken, say: "Where they plainly import a charge of mere intention to do a criminal act, or only amount to an assertion that the plaintiff will do it at a future time, they are not actionable." In *Seaton v. Cordray*, Wright (Ohio) 101, the court say: "An action may be sustained for charging another with being a thief, or with having stolen, but not for imputing a mere intention to steal, or with having an evil disposition. The foundation of the slander is that the charge, if true, would subject the accused to infamous punishment; an evil disposition, without act, cannot so subject any one." See, also, *Townsh. Sland. & L.* (3d Ed.) 161; *McKee v. Ingalls*, 4 Scam. (Ill.) 30; *Harrison v. Stratton*, 4 Esp. 218; *Wilson v. Tatum*, 53 N. C. 300; *Stoner v. Audely*, Cro. Eliz. 250; *Dr. Poe's Case*, cited in *Murrey v. —*, 2 Bulst. 206; 1 Vin. Abr. 440; *Odgers, Sland. & L.* 57; *Sillars v. Collier*, 151 Mass. 50, 53, 54, 23 N. E. 723, 6 L. R. A. 680. But the plaintiff contends, in support of his declaration, that any defamatory or disparaging words spoken of another, which cause special damage, are actionable. While we cannot subscribe to quite so broad a statement of the law as this, yet we think that the proposition is substantially correct; that is to say, that false, defamatory words, spoken of another, are either actionable per se, or by reason of having caused special damage. We do not think, however, that the words relied on in the declaration are defamatory, within the legal meaning

of that term. To defame another by language is to harm or destroy his good fame or reputation, or to disgrace or calumniate him. In order to have this evil effect, however, it is evident that the language used concerning him must relate to his conduct or character as they now are or have been in the past, and not be the mere opinion of the speaker as to what they will be at some indefinite period in the future. In other words, that language which amounts to a mere assertion or opinion as to what will be the future conduct or character of another is not actionable; but that it is only actionable when it relates to what the person now is, or has been in the past, or to what he is doing or attempting to do, or has done or attempted to do in the past; that is, when it relates to something actual, instead of something which is merely imaginary or conjectural. The character of a man is what he now is, and not what he may be at some future time. Among the multitude of different forms of expression found in the books which have been held to be actionable we have been unable to find any case, nor have we been referred to any, in which language analogous to that relied on in the plaintiff's declaration has been held sufficient to maintain an action for slander. Demurrer sustained.

2. CONTAGIOUS OR INFECTIOUS DISEASE[†]

COUNT JOANNES v. BURT.

(Supreme Judicial Court of Massachusetts, 1863. 6 Allen, 236, 83 Am. Dec. 625.)

Tort brought in the name of "George, the Count Joannes," seeking to recover damages for slander. The defendant demurred to the declaration as not setting forth any legal cause of action.

HOAR, J.⁸ * * * The declaration is in tort for slander, by orally imputing insanity to the plaintiff. We are aware of no authority for maintaining such an action, without the averment of special damage. The authorities upon which the plaintiff relies are both cases of libel. *The King v. Harvey*, 2 B. & C. 257; *Southwick v. Stevens*, 10 Johns. (N. Y.) 443. An action for oral slander, in charging the plaintiff with disease, has been confined to the imputation of such loathsome and infectious maladies as would make him an object of disgust and aversion, and banish him from human society. We believe the only examples which adjudged cases furnish are of the plague, leprosy, and venereal disorders. * * *

Appeal dismissed.

[†] For discussion of principles, see Chapin on Torts, §§ 68-74.

⁸ The statement of facts is abridged and a portion of the opinion is omitted.

3. TENDENCY TO PREJUDICE PARTY IN OFFICE, TRADE OR PROFESSION⁹

SECOR v. HARRIS.

(Supreme Court of New York, General Term, 1854. 18 Barb. 425.)

MASON, J. This is an action for slander. Upon trial of the cause, the plaintiff proved the following words, which were also alleged in the complaint: "Dr. Secor killed my children." "He gave them teaspoonful doses of calomel, and they died." "Dr. Secor gave them teaspoonful doses of calomel, and it killed them; they did not live long after they took it. They died right off—the same day." The plaintiff was proved to be a practicing physician, and the evidence shows that he had practiced in the defendant's family, and had prescribed for the defendant's children, and that the words were spoken of him in his character of a physician. The plaintiff claimed that the words were actionable, and that he was entitled to have this branch of the case, upon the words, submitted to the jury. The judge at the circuit held that the words were not actionable, and took them from the consideration of the jury. These words spoken of the plaintiff as a physician are actionable per se, whatever may be said upon the question whether they impute a criminal offense. They do not impute a criminal offense, unless there is evidence, arising from the quantity of the calomel which the defendant alleged that the plaintiff gave these children, from which a jury would be justified in finding an intention to kill them. One of them was three years of age, and the other one year and a half. If the natural result, which should reasonably be expected from feeding children of such tender years full teaspoon doses of calomel, would be certain death, then it is not a forced construction of the words to say that the defendant intended to charge the plaintiff with an intention to kill these children in giving them such doses. It is not necessary, however, to say that the judge should have submitted this case to the jury upon the question whether the defendant did not intend to impute to the plaintiff by these words a criminal offense. I am quite inclined to think, however, that had the judge submitted the case to the jury upon the imputation of a criminal intent in these words, and had the jury found that such intent was imputed, we should not be justified in setting aside their verdict. It is not necessary, however, to place the case upon this ground; for it is certainly slanderous to say of a physician that he killed these children of such tender years, by giving them teaspoonful doses of calomel.

⁹ For discussion of principles, see Chapin on Torts, §§ 68-74.

The charge, to say the least, imports such a total ignorance of his profession as to destroy all confidence in the physician. It is a disgrace to a physician to have it believed that he is so ignorant of this most familiar and common medicine as to give such quantities thereof to such young children. The law is well settled that words published of a physician, falsely imputing to him general ignorance or want of skill in his profession, are actionable, in themselves, on the ground of presumed damage. *Starkie on Slander*, 100, 110, 115; *Martyn v. Burlings*, *Cro. Eliz.* 589; *Bac. Abr. tit. "Slander," B*; *Watson v. Van Dersdash*, *Het.* 69; *Tutler v. Alwin*, 11 *Mod.* 221; *Smith v. Taylor*, 1 *New R.* 196; *Sumner v. Utley*, 7 *Conn.* 257. I am aware that it was held in the case of *Poe v. Mendford*, *Cro. Eliz.* 620, that it is not actionable to say of a physician, "He hath killed a patient with physic," and that, upon the strength of the authority of that case, it was decided in this court in *Foot v. Brown*, 8 *Johns.* 64, that it was not actionable to say of an attorney or counselor, when speaking of a particular suit, "He knows nothing about the suit; he will lead you on until he has undone you." These cases are not sound. The case of *Poe v. Mendford* is repudiated in *Bacon's Abridgment* as authority, and cases are referred to as holding a contrary doctrine. Volume 9, pp. 49, 50. The cases of *Poe v. Mendford* and of *Foot v. Brown* were reviewed by the supreme court of Connecticut in the case of *Sumner v. Utley*, 7 *Conn.* 257, with most distinguished ability, and the doctrine of those cases repudiated. In the latter case it is distinctly held that words are actionable in themselves which charge a physician with ignorance or want of skill in his treatment of a particular patient, if the charge be such as imports gross ignorance or unskillfulness. To the same effect is the case of *Johnson v. Robertson*, 8 *Port. (Ala.)* 486, where it was held that the following words, spoken of a physician in regard to his treatment of a particular case, "He killed the child by giving it too much calomel," are actionable in themselves; and such is the case of *Tutler v. Alwin*, 11 *Mod.* 221, where it was held to be actionable to say of an apothecary that "he killed a patient with physic." See, also, 3 *Wilson*, 186; *Bac. Abr. tit. "Slander," letter B 2*, vol. 9, p. 49 (*Bouy. Ed.*). The cases of *Poe v. Mendford* and *Foot v. Brown* have been repudiated by the highest judicial tribunal in two of the American states, while the case of *Poe v. Mendford* seems to have been repudiated in England; and I agree with *Clinch, Justice*, that the reason upon which that case is decided is not apparent. I do not go the length to say that falsehood may not be spoken of a physician's practice, in a particular case, without subjecting the party to this action. A physician may mistake the symptoms of a patient, or may misjudge as to the nature of his disease, and even as to the powers of medicine, and yet his error may be of that pardonable kind that will do him no essential prejudice, because it is rather a proof of human imperfection than of culpable ignorance or unskillfulness; and, where

charges are made against a physician that fall within this class of cases, they are not actionable without proof of special damages. 7 Conn. 257. It is equally true that a single act of a physician may evince gross ignorance, and such a total want of skill as will not fail to injure his reputation, and deprive him of general confidence. When such a charge is made against a physician, the words are actionable per se. 7 Conn. 257. The rule may be laid down as a general one that, when the charge implies gross ignorance and unskillfulness in his profession, the words are actionable per se. This is upon the ground that the law presumes damage to result from the very nature of the charge. The law in such a case lays aside its usual strictness; for when the presumption of damage is violent, and the difficulty of proving it is considerable, the law supplies the defect, and, by converting presumption into proof, secures the character of the sufferer from the misery of delay, and enables him at once to face the calumny in open court. Starkie on Slander, 581. It was well said by the learned Chief Justice Hosmer in *Sumner v. Utley*, 7 Conn. 257, that: "As a general principle, it can never be admitted that the practice of a physician or surgeon in a particular case may be calumniated with impunity, unless special damage is shown. By confining the slander to particulars, a man may thus be ruined in detail. A calumniator might follow the track of the plaintiff, and begin by falsely ascribing to a physician the killing of three persons by mismanagement, and then the mistaking an artery for a vein, and thus might proceed to misrepresent every single case of his practice, until his reputation should be blasted beyond remedy. Instead of murdering character by one stroke, the victim would be cut successively in pieces, and the only difference would consist in the manner of effecting the same result." It is true, as was said by the learned Chief Justice Hosmer in that case, the redress proposed, on the proof of special damage, is inadequate to such a case. Much time may elapse before the fact of damage admits of any evidence, and then the proof will always fall short of the mischief. In the meantime the reputation of the calumniated person languishes and dies, and hence, as we have before said, the presumption of damage being violent, and the difficulty of proving it considerable, the law supplies the defect by converting presumption of damage into proof (*Starkie on Slander*, 581); in other words, the law presumes that damages result from the speaking of the words. In the case under consideration, the words proved impute to the plaintiff such gross ignorance of his profession, if nothing more, as would be calculated to destroy his character wherever the charge should be credited. It would be calculated to make all men speak out and say, as did the witness Richard Morris, "that it was outrageous, and the plaintiff ought not to be permitted to practice." The law will therefore presume damages to result from the speaking of the words, and consequently hold the words actionable in themselves. The judge at the circuit erred in taking this branch of the case from the considera-

tion of the jury, and a new trial must be granted, costs to abide the event of the action.

New trial granted. CRIPPEN, J., concurred. SHANKLAND, J., dissented.

4. LIBEL¹⁰

BUCKSTAFF v. VIALI.

(Supreme Court of Wisconsin, 1893. 84 Wis. 129, 54 N. W. 111.)

ORTON, J. The demurrer to the second count of the complaint, on the ground that it did not state a cause of action, was overruled, and the defendant has appealed from said order. The action is for libel. The complaint substantially sets forth the following libelous matter: The plaintiff was a resident of the city of Oshkosh, Winnebago county, in this state, and a state senator of the nineteenth senatorial district, comprising a large portion of said county, at the date hereinafter stated. The defendant was at the same time doing business in said city as a publisher, under the name of E. W. Viall & Co., and the sole owner and publisher of the Oshkosh Times, a daily newspaper of wide circulation, and published in said city. The defendant, on the 19th day of March, 1889, maliciously published in said newspaper an editorial article containing the following false and defamatory matter concerning the plaintiff, to wit: "A Prayer to Bucksriff [meaning the plaintiff]. It hath ever been the custom, from time immemorial, to appease the wrath or obtain the favor of the gods through the medium of prayer. Oshkosh is now in a situation where a resort to this means of grace is advisable. Through her representatives in council, she has asked the passage of certain amendments of her charter. These can be obtained through divine favor of Senator Bucksriff [meaning the plaintiff], the legislative god of Winnebago county. His majesty, Bucksriff [meaning the plaintiff], under the pretense of consulting some of his friends, who are a number of well-known little political gods of Oshkosh, intends to defeat these amendments by procrastination and delay until it is too late for their adoption by the legislature in time for the spring election. As the means of obtaining the favor of this wonderful legislative god, his majesty, Bucksriff [meaning the plaintiff], the Times recommends that the citizens of Oshkosh offer up to him the following prayer: 'We are sensible, O dearly-beloved Bucksriff [meaning the plaintiff], of thy great wisdom and power, and humbly beseech thee that thou wilt favor us with certain amendments to our city charter. Know thou, O divine senator [meaning the plain-

¹⁰ For discussion of principles, see Chapin on Torts, §§ 68-74.

tiff], compared with whom all other senators are merely ciphers who draw per diem and mileage from the state [meaning the opposite], wilt thou make and ordain certain great and wise laws,' etc. 'Know, thou, also, mighty, eloquent, and beautiful senatorial god,' etc. [meaning this plaintiff, and intending, by irony and sarcasm in the words used, to sneer at and ridicule the deformity of the plaintiff, caused by a partial paralysis on one side of his face and body]. 'While it is within thy mighty power to defeat the will of the people of Oshkosh, forget, O mighty being [meaning the plaintiff], the advice of thy friends, the little republican ward gods, and look with thy mighty right eye alone,' etc. [meaning the plaintiff, and again, in an ironical sense, alluding to the partial paralysis of this plaintiff]. 'And, in conclusion, thou divine South Side dictator [meaning the plaintiff], we implore that thou wilt reconsider thy determination to defeat the laws,' etc. * * * There will be one chance in fifty, at least, of his Third ward omnipotence [meaning the plaintiff] surrendering his own wishes, and following those of the people." This publication greatly injured the plaintiff in his office as senator, and in his reputation, and brought him into public ridicule and contempt. The plaintiff demands \$30,000 and costs. The words more especially libelous are: "Prayer to Bucksriff;" "Divine favor of Senator Bucksriff;" "The legislative god of Winnebago county;" "His majesty, Bucksriff;" "We are sensible, O dearly-beloved Bucksriff, of thy great wisdom and power, and humbly beseech thee;" "Know thou, O divine senator, compared with whom all other senators are merely ciphers;" "Know thou, also, mighty, eloquent, and beautiful senatorial god;" "Forget, O mighty being, the advice of thy friends, the little republican ward gods, and look with thy mighty right eye alone to the good of the city;" "Thou divine South Side dictator, we implore," etc.; "Third ward omnipotence."

The grounds of the demurrer are: (1) That the article is not libelous; (2) that it is privileged; (3) that the innuendoes cannot make the matter libelous which is otherwise not so. The complaint charges that the defendant published the article maliciously, and of and concerning the plaintiff. It begins in the form and heading of a prayer to Bucksriff (meaning the plaintiff).

The name itself is libelous. It is a nickname which is a name of reproach, and an opprobrious appellation, and is in the similitude of "Pecksniff," one of the familiar and most contemptible characters in Dickens, and readily suggests that name to the reader, and it is repeated several times. It is used to excite ridicule and contemptuous derision. He is called "Senator Bucksriff" to more clearly show it was meant for the plaintiff. The article is of and concerning the plaintiff as senator of Winnebago county. He is also called "His majesty, Bucksriff," "A legislative god," "Dearly-beloved Bucksriff," "Divine senator," "Mighty being," "Omnipotence." These appellations may mean that he is vain, self-conceited, pompous, self-aggrandizing, and

assumes a despotic and god-like character above his constituents and all other men, and has to be prayed to and beseeched for legislative favors; or it may be, and probably is, ironical, which is a kind of ridicule which expresses a fault and apparent assent, but meaning the opposite,—that is, that he is not the greatest, but the smallest and meanest; or sarcastical or satirical, indicating scorn, contempt, a taunt or a gibe. These very words and phrases are per se libelous. "That which is written or printed and published, calculated to injure the character of another, by bringing him into ridicule or contempt," or "tends to prejudice him in his office," is libelous per se, by all the authorities. The address to the plaintiff as "O dearly-beloved Bucksniff," is ironical and contemptuous, meaning the opposite,—hated, despised Bucksniff. The whole article, in its general scope and meaning, is calculated to injure the plaintiff in his reputation and character, both as a citizen and a senator, by bringing him into shame, disgrace, hatred, scorn, ridicule, and contempt, and is grossly libelous. *Cary v. Allen*, 39 Wis. 483; *Cottrill v. Cramer*, 43 Wis. 242; *Solverson v. Peterson*, 64 Wis. 198, 25 N. W. 14, 54 Am. Rep. 607; *Bradley v. Cramer*, 59 Wis. 309, 18 N. W. 268, 48 Am. Rep. 511; *Lansing v. Carpenter*, 9 Wis. 541, 76 Am. Dec. 281; *Spiering v. Andrae*, 45 Wis. 330, 30 Am. Rep. 744. The phrases, "beautiful senatorial god," "And look with thy mighty right eye alone," are explained by a colloquium, not by an innuendo, as claimed by the learned counsel of the appellant. "An innuendo is to define the defamatory meaning which the plaintiff sets on the words, and show how they came to have that defamatory meaning, and how they relate to the plaintiff." A colloquium is the statement of extraneous facts and circumstances necessary to fully understand the defendant's words. The complaint states that these words were spoken "to sneer at and ridicule the deformity of the plaintiff, caused by a partial paralysis of one side of his face and body." The learned counsel of the appellant contends that they have no such meaning. But that is a question for the jury, on the proof of the facts stated. It is difficult to understand what these phrases do mean, if they have not reference to some bodily deformity that gives the plaintiff's face an ugly or disagreeable appearance. The word "beautiful" is used ironically, to mean the opposite most clearly, and the "mighty right eye alone" would indicate that the other eye was closed or injured. It seems very probable that the explanation in the colloquium is the correct one. With this explanation, the phrases are clearly libelous, as exciting ridicule, contumely, and shame.

Are the above words and phrases privileged? "A privileged communication is a fair comment by a public journal upon a matter of public interest." *Starkie, Sland. & L.* (Ed. 1877) 332. If this article was a fair or reasonable comment upon the plaintiff's official conduct as state senator, or upon his neglect of his legislative duties, and that was all, it might be privileged. The only part of the article that

can be called a comment upon his legislative conduct as state senator is as follows: "His majesty, Bucksniff, under the pretense," etc., "intends to defeat these amendments [of the Oshkosh city charter] by procrastination and delay until it is too late for their adoption by the legislature in time for the spring election." This part of the article, standing alone, would scarcely be libelous; but if so, it might be also privileged. But those parts of the article, and the most of it, which we have considered above, have no necessary connection with this unobjectionable comment. They are not comments, in any sense, upon the plaintiff's legislative course of action. They are simply gibes, taunts, and contemptuous and insulting phrases; and most of them personally addressing and alluding to the plaintiff, and independent of and distinct from any reasonable comments upon his personal or official derelictions of duty, and are not justified or excused by them. They are clearly not privileged, by any principle of law.

The libelous matter of the article is not enlarged by the innuendoes. The office and use of an innuendo are stated above, and are in the complaint. It is used mostly, and properly, to show the person to whom the libelous matter relates. The second count of the complaint clearly states a good cause of action, and the demurrer was properly overruled. The order of the circuit court is affirmed, and the cause remanded for further proceedings at law.

IV. Defenses

1. FAIR COMMENT ¹¹

SIR JOHN CARR, Knt., v. HOOD et al.

(London Sittings, after Trinity Term. 1808. 1 Camp. 355, note,
10 R. R. 701, note.)

The declaration stated that the plaintiff, before the publishing of any of the libels thereafter mentioned, was the author of a certain book entitled "The Stranger in France," a certain other book entitled "A Northern Summer," a certain other book entitled "The Stranger in Ireland," which said books had been respectively published in 4to, yet that defendant, intending to bring upon plaintiff great contempt, laughter and ridicule, falsely and maliciously published a certain false, scandalous, malicious, and defamatory libel, in the form of a book, of and concerning the said books, of which the said Sir John was the author as aforesaid, which same libel was entitled "My Pocket Book, or Hints for a Ryghte Merrie and 'Conceited Tour," in quarto, to be

¹¹ For discussion of principles, see Chapin on Torts, §§ 72, 73.

called, "The Stranger in Ireland in 1805" (thereby alluding to the said book of the said Sir John, thirdly above mentioned), by a Knight Errant (thereby alluding to the said Sir John), and which same libel contained therein a certain false, scandalous, malicious, and defamatory print, of and concerning the said Sir John, and of and concerning the said books of the said Sir John, 1st and 2ndly above mentioned, therein called "Frontispiece," and entitled "The Knight (meaning the said Sir John) Leaving Ireland with Regret," and containing and representing in the said print, a certain false, scandalous, and malicious, defamatory, and ridiculous representation of the said Sir John, in the form of a man of ludicrous and ridiculous appearance, holding a pocket handkerchief to his face and appearing to be weeping, and also containing therein, a certain false, malicious, and ridiculous representation of a man of ludicrous and ridiculous appearance, following the said representation of the said Sir John, and representing a man loaded with, and bending under the weight of, three large books, one of them having the word "Baltic," printed on the back thereof, etc., and a pocket handkerchief appearing to be held in one of the hands of the said representation of a man, and the corners thereof appearing to be held or tied together, as if containing something therein, with the printed word "Wardrobe" depending therefrom (thereby falsely, scandalously and maliciously meaning and intending to represent, for the purpose of rendering the said Sir John ridiculous, and exposing him to laughter, ridicule and contempt, that one copy of the said 1st mentioned book of the said Sir John, and two copies of the said book of the said Sir John 2ndly above mentioned, were so heavy as to cause a man to bend under the weight thereof, and that his the said Sir John's wardrobe was very small, and capable of being contained in a pocket handkerchief.

The declaration concluded by laying as special damage that the plaintiff had been prevented and hindered from selling to Sir Richard Philips, Knt., for £600, the copyright of a certain book of which the plaintiff was the author, containing an account of a tour by him through part of Scotland. Plea, Not guilty.

Lord ELLENBOROUGH, as the trial was proceeding, intimated an opinion, that if the book published by the defendants only ridiculed the plaintiff as an author, the action could not be maintained.

Garrow for the plaintiff allowed that, when his client came forward as an author, he subjected himself to the criticism of all who might be disposed to discuss the merits of his works; but that criticism must be fair and liberal; its object ought to be to enlighten the public, and to guard them against the supposed bad tendency of a particular publication presented to them, not to wound the feelings and to ruin the prospects of an individual. If ridicule was employed it should have some bounds. While a liberty was granted of analyzing literary productions, and pointing out their defects, still he must be considered as a libeler whose only object was to hold up an author to the laughter and contempt of mankind. A man with a wen upon his neck perhaps

could not complain if a surgeon in a scientific work should minutely describe it, and consider its nature and the means of dispersing it; but surely he might support an action for damages against any one who should publish a book to make him ridiculous on account of this infirmity, with a caricature print as a frontispiece. The object of the book published by defendants clearly was by means of immoderate ridicule to prevent the sale of plaintiff's works and entirely destroy him as an author. In the late case of *Tabart v. Tipper*, his Lordship had held that a publication by no means so offensive or prejudicial to the object of it, was libelous and actionable.

LORD ELLENBOROUGH. In that case the defendant had falsely accused the plaintiff of publishing what he had never published. Here the supposed libel has only attacked those works of which Sir John Carr is the avowed author; and one writer in exposing the follies and errors of another may make use of ridicule however poignant. Ridicule is often the fittest weapon that can be employed for such a purpose. If the reputation or pecuniary interests of the person ridiculed suffer, it is *damnum absque injuria*. Where is the liberty of the press if an action can be maintained on such principles? Perhaps the plaintiff's "*Tour Through Scotland*" is now unsaleable; but is he to be indemnified by receiving a compensation in damages from the person who may have opened the eyes of the public to the bad taste and inanity of his compositions? Who would have bought the works of Sir Robert Filmer after he had been refuted by Mr. Locke? But shall it be said that he might have sustained an action for defamation against that great philosopher, who was labouring to enlighten and ameliorate mankind? We really must not cramp observations upon authors and their works. They should be liable to criticism, to exposure, and even to ridicule, if their compositions be ridiculous; otherwise the first who writes a book on any subject will maintain a monopoly of sentiment and opinion respecting it. This would tend to the perpetuity of error. Reflection on personal character is another thing. Shew me an attack on the moral character of this plaintiff, or any attack upon his character unconnected with his authorship, and I shall be as ready as any judge who ever sate here to protect him; but I cannot hear of malice on account of turning his works into ridicule.

The counsel for the plaintiff still complaining of the unfairness of this publication, and particularly of the print affixed to it, the trial proceeded.

LORD ELLENBOROUGH said: Every man who publishes a book commits himself to the judgment of the public, and any one may comment upon his performance. If the commentator does not step aside from the work, or introduce fiction for the purpose of condemnation, he exercises a fair and legitimate right. In the present case, had the party writing the criticism followed the plaintiff into domestic life for the purposes of slander, that would have been libelous; but no passage of this sort has been produced, and even the caricature does

not affect the plaintiff, except as the author of the book which is ridiculed. The works of this gentleman may be, for aught I know, very valuable; but whatever their merits, others have a right to pass their judgment upon them—to censure them if they be censurable, and to turn them into ridicule if they be ridiculous. The critic does a great service to the public, who writes down any vapid or useless publication, such as ought never to have appeared. He checks the dissemination of bad taste, and prevents people from wasting both their time and money upon trash. I speak of fair and candid criticism; and this every one has a right to publish, although the author may suffer a loss from it. Such a loss the law does not consider as an injury; because it is a loss which the party ought to sustain. It is in short the loss of fame and profits to which he was never entitled. Nothing can be conceived more threatening to the liberty of the press than the species of action before the court. We ought to resist an attempt against free and liberal criticism at the threshold.

The Chief Justice concluded by directing the jury that, if the writer of the publication complained of had not traveled out of the work he criticised for the purpose of slander, the action would not lie; but if they could discover in it anything personally slanderous against the plaintiff, unconnected with the works he had given to the public, in that case he had a good cause of action, and they would award him damages accordingly.

Verdict for the defendants.¹²

2. PRIVILEGE

(A) *Absolute Privilege*¹³

SCOTT v. STANSFIELD.

(Court of Exchequer, 1868. L. R. 3 Exch. 220.)

Declaration, for that the plaintiff carried on the business of an accountant and scrivener, and the defendant spoke and published of and concerning him, in relation to his said business, the words following: "You," meaning the plaintiff, "are a harpy, preying on the vitals of the poor."

Plea, that at the time when the alleged grievance was committed, the defendant was the judge of a certain court of record, being the County Court of Yorkshire, and spoke and published the words complained of when he was sitting in the said court, and acting in his

¹² Compare *Buckstaff v. Viall*, *supra*, p. 164.

¹³ For discussion of principles, see Chaplin on Torts, § 73 (3).

capacity as such judge, and was as such judge hearing and trying a cause in which the now plaintiff was defendant, the hearing and determination of which was within the jurisdiction of the said court. Replication, that the said words so spoken and published by the defendant were spoken falsely and maliciously, and without any reasonable, probable or justifiable cause, and without any foundation whatever, and not bona fide in the discharge of his duty as judge as aforesaid, and were wholly uncalled for, immaterial, irrelevant, and impertinent, in reference to, or in respect of, the matters before him, and were wholly unwarranted on the said occasion, of all which premises the defendant had notice before and at the time of the committing of the said grievance, and then well knew.

To this replication the defendant demurred, and the plaintiff joined in the issue thus raised.

MARTIN, B.¹⁴ It seems to me quite clear that words spoken under the circumstances stated in these pleadings are not the subject of an action of slander. The plea states that the defendant at the time when he spoke the words complained of, was sitting as the judge of a court of record, and spoke them while acting in his capacity of judge, and trying a cause within his jurisdiction in which the present plaintiff was the defendant. If the words spoken under such circumstances were the subject of an action of slander, the most mischievous consequences would ensue; no judge would then be able freely to administer justice, for if it were alleged, as is the case here, that he spoke falsely and maliciously, and not bona fide in the discharge of his duty, and that what he said was irrelevant to the matter in hand, a jury would have to determine the question whether what he said in the course of a case which he had jurisdiction to try was or was not said under the circumstances so alleged. What judge could try a case with any degree of independence if he was to be afterwards subject to have his conduct in the administration of justice commented on to a jury, and the propriety of it determined by them? It appears to me that the opinion expressed by Chief Justice Kent, in the American case cited,¹⁵ puts this matter upon its proper foundation, and states, that which is both sound law and good sense in reference to it. I do not think we are really deciding anything new, for to my mind the decisions of the Court of Queen's Bench have gone the full length of our present decision.

Judgment for the defendant.

¹⁴ The statement of the case is abridged and the concurring opinions of Kelly, C. B., and Bramwell and Channell, B. B., are omitted.

¹⁵ *Yates v. Lansing*, 5 Johns. (N. Y.) 282 (1810); *Id.*, 9 Johns. 395, 6 Am. Dec. 290 (1811).

*(B) Qualified Privilege*¹⁶

WASON v. WALTER.

(Court of Queen's Bench, 1868. L. R. 4 Q. B. 73.)

A petition of the plaintiff was presented to the House of Lords charging a high judicial officer with having made a false statement to his own knowledge, in order to deceive a committee of the House of Commons, and praying inquiry and the removal of the officer if the charge was found true. A debate ensued on the presentation of the petition, and the charge was utterly refuted. In the course of the debate, statements disparaging to the character of the plaintiff were made by the Lord Chancellor and other Lords. The Times newspaper published a faithful and correct report of these proceedings in the House of Lords, including the debate. The plaintiff sued the proprietor of the Times for libel. The defendant pleaded "Not guilty."

At the trial, the Lord Chief Justice told the jury that if they were satisfied that the matter charged as a libel in the first count was a faithful and correct report of the proceedings in the House of Lords, and of the speeches delivered on the occasion, he directed them in point of law that it was a privileged publication, and one which was not the subject of a civil action, and they should find for the defendant on that count.

There was a verdict for the defendant. Afterwards a rule was obtained for a new trial, on the ground of a misdirection in charging the jury that the publication of the libel was privileged if they should find it to be a true and faithful report of the debate in the House of Lords.

COCKBURN, C. J.¹⁷ * * * The main question for our decision is whether a faithful report in a public newspaper of a debate in either house of parliament, containing matter disparaging to the character of an individual, as having been spoken in the course of the debate, is actionable at the suit of the party whose character has thus been called in question. We are of opinion that it is not.

Important as the question is, it comes now for the first time before a court of law for decision. Numerous as are the instances in which the conduct and character of individuals have been called in question in parliament during the many years that parliamentary debates have been reported in the public journals, this is the first instance in which an action of libel, founded on a report of a parliamentary debate has come before a court of law. There is, therefore, a total absence of di-

¹⁶ For discussion of principles, see Chapin on Torts, § 73 (3).

¹⁷ The statement of the case and the opinion are abridged.

rect authority to guide us. There are, indeed, dicta of learned judges having reference to the point in question, but they are conflicting and inconclusive, and, having been unnecessary to the decision of the cases in which they were pronounced, may be said to be extrajudicial. In the case of *Rex v. Wright*, 8 T. R. 293, Lawrence, J., placed the reports of parliamentary debates on the same footing with respect to privilege as is accorded to reports of proceedings in courts of justice, and expressed an opinion that the former were as much entitled to protection as the latter. But it is to be observed that in that case the question related to the publication by the defendant of a copy of a report of a committee of the House of Commons, which report the House had ordered to be printed, not to the publication of a debate unauthorized by the House. * * *

Decided cases thus leaving us without authority on which to proceed in the present instance, we must have recourse to principle in order to arrive at a solution of the question before us, and fortunately we have not far to seek before we find principles in our opinion applicable to the case, and which will afford a safe and sure foundation for our judgment.

It is now well established that faithful and fair reports of the proceedings of courts of justice, though the character of individuals may incidentally suffer, are privileged, and that for the publication of such reports the publishers are neither criminally nor civilly responsible. The immunity thus afforded in respect of the publication of proceedings of courts of justice rests upon a twofold ground. * * *

The other and broader principle on which this exception to the general law of libel is founded is that the advantage to the community from publicity being given to the proceedings of courts of justice is so great that the occasional inconvenience to individuals arising from it must yield to the general good. It is true that with a view to distinguish the publication of proceedings in Parliament from that of proceedings of courts of justice it has been said that the immunity accorded to the reports of the proceedings of courts of justice is grounded on the fact of the courts being open to the public, while the houses of Parliament are not; as also that by the publication of the proceedings of the courts the people obtain a knowledge of the law by which their dealings and conduct are to be regulated. But in our opinion the true ground is that given by Lawrence, J., in *Rex v. Wright*, namely, that: "Though the publication of such proceedings may be to the disadvantage of the particular individual concerned, yet it is of vast importance to the public that the proceedings of courts of justice should be universally known. The general advantage to the country in having these proceedings made public, more than counterbalances the inconvenience of the private persons whose conduct may be the subject of such proceedings." In *Davison v. Duncan*, 7 E. & B. 231, Lord Campbell says: "A fair account of what takes place in a court of justice is privileged.

The reason is that the balance of public benefit from publicity is great. It is of great consequence that the public should know what takes place in court; and the proceedings are under the control of the judges. The inconvenience, therefore, arising from the chance of injury to private character is infinitesimally small as compared to the convenience of publicity." And Wightman, J., says: "The only foundation for the exception is the superior benefit of the publicity of judicial proceedings which counterbalances the injury to individuals, though that at times may be great." * * *

We entirely concur with Lawrence, J., in *Rex v. Wright*, 8 T. R. 298, that the same reasons which apply to the reports of the proceedings in courts of justice apply also to the proceedings in Parliament. It seems to us impossible to doubt that it is of paramount public and national importance that the proceedings of the houses of Parliament shall be communicated to the public, who have the deepest interest in knowing what passes within their walls, seeing that on what is there said and done, the welfare of the community depends. * * * The analogy between the two cases is in every respect complete. If the rule has never been applied to the reports of parliamentary proceedings till now, we must assume that it is only because the occasion has never before arisen. If the principles which are the foundation of the privilege in the one case are applicable to the other, we must not hesitate to apply them, more especially when by so doing we avoid the glaring anomaly and injustice to which we have before adverted. Whatever disadvantages attach to a system of unwritten law, and of these we are fully sensible, it has at least this advantage, that its elasticity enables those who administer it to adapt it to the varying conditions of society, and to the requirements and habits of the age in which we live, so as to avoid the inconsistencies and injustice which arise when the law is no longer in harmony with the wants and usages and interests of the generation to which it is immediately applied. Our law of libel has, in many respects, only gradually developed itself into anything like a satisfactory and settled form. The full liberty of public writers to comment on the conduct and motive of public men has only in very recent times been recognized. Comments on government, on ministers and officers of state, on members of both houses of Parliament, on judges and other public functionaries, are now made every day, which half a century ago would have been the subject of actions or ex officio informations, and would have brought down fine and imprisonment on publishers and authors. Yet who can doubt that the public are gainers by the change, and that, though injustice may often be done, and though public men may often have to smart under the keen sense of wrong inflicted by hostile criticism, the nation profits by public opinion being thus freely brought to bear on the discharge of public duties? Again, the recognition of the right to publish the proceedings of courts of justice has been of modern growth.

Till a comparatively recent time the sanction of the judges was thought necessary even for the publication of the decisions of the courts upon points of law. * * *

It is to be observed that the analogy between the case of reports of proceedings of courts of justice and those of proceedings in Parliament being complete, all the limitations placed on the one to prevent injustice to individuals will necessarily attach on the other; a garbled or partial report, or of detached parts of proceedings, published with intent to injure individuals, will equally be disentitled to protection. Our judgment will in no way interfere with the decisions that the publication of a single speech for the purpose or with the effect of injuring an individual will be unlawful, as was held in the cases of *Rex v. Lord Abingdon*, 1 Esp. 226, and *Rex v. Creevey*, 1 M. & S. 273. * * *

Rule discharged.

BROW v. HATHAWAY.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 239.)

Tort for slander. The declaration contained two counts, and the words set forth as slanderous were as follows: "You (meaning the plaintiff) entered our shop and took fifty-eight dollars' worth of goods." "She (meaning the plaintiff) took the goods and has stolen other things before. She stole the goods we missed." "My wife accuses Josephine of entering her shop with a key Monday night, and taking fifty-eight dollars' worth of goods." "When we took account of stock, I accused her to my wife of taking two hundred dollars' worth, either in goods or money." "If I do not (meaning, If I do not lose any more goods), I shall certainly say it was Josephine; and if I do, I shall lay it to her." "There has been as good girls as she was, as far as I know, accused of stealing, and owned up to it." "There have been a great number of innocent persons convicted without doubt, and you might be." "When we took account of stock I accused her then to my wife, of taking to the amount of two hundred dollars, either in goods or money, and told her it was time to discharge Josephine, and go into the front part of the shop herself."

The answer denied the speaking of the words, and set forth, amongst other things, that the defendant's wife was engaged in business in Fall River, and he was interested therein with her, and the plaintiff had been employed by her in the business, and various articles and sums of money had been missed from the shop; and, if the defendant spoke the words charged, they were spoken in good faith, without malice, for the sake of public justice, in the prosecution of an inquiry into a suspected crime, in matters where his interest was

concerned, to enable him to protect his interest, and in the belief that they were true.

At the trial in the superior court, before Vose, J., the plaintiff introduced evidence tending to prove the speaking of the words alleged. The defendant thereupon introduced evidence tending to prove that he with his wife kept a milliner's shop in Fall River; that the plaintiff was employed there in 1864; that the other persons employed there were his wife and son; that on taking an account of stock in July, 1864, he discovered a deficit of some two hundred dollars which he could not account for; that he afterwards missed more goods; and that he suspected the plaintiff and discharged her in December, 1864, without informing her of his suspicions or assigning any reasons except that he thought he could do better in his front shop. There was also evidence tending to prove that on the night of January 9, 1865, some person familiar with the premises entered the shop and stole about fifty dollars' worth of goods, of a kind such as the plaintiff had expressed a desire for; that on the morning of January 10th the defendant reported his loss at the police office of the city, and a police officer, without having any warrant, went with him to the house of the plaintiff's mother, where the plaintiff lived, and were invited in by the plaintiff, and upon an inquiry by the mother what they wanted the defendant answered that some one had entered his shop, and he then proceeded to use the words charged in the declaration in the presence of the plaintiff and her mother and younger sister and the police officer. Permission to search the premises was granted, but no goods were found. The defendant testified that whatever he said or did was in good faith, without malice, and because he believed his suspicions to be true.

The defendant thereupon contended that the words constituted a privileged communication, for the making of which he was not liable. But the judge instructed the jury that if the defendant used the words and language alleged in the declaration he would be legally liable therefor, although they might have been used under the circumstances testified, and although he might have believed them to be true, and have had no malicious design to defame the plaintiff.

The jury returned a verdict for the plaintiff, with \$498.28 damages, and the defendant alleged exceptions.

WELLS, J. The defendant's wife having lost goods from her store, and having grounds to suspect that the plaintiff had stolen them, the defendant applied to the chief of police, and, at his suggestion, went with a police officer to the house where the plaintiff resided with her mother, to make inquiry into the matter. No search warrant was taken, but a search was made by permission of the mother and the plaintiff. No stolen goods were found. This proceeding had no authority of law, but, with the assent of the householder, there was no impropriety in it; and there is nothing in the case to show that it was

resorted to, or that the attendance of the police officer was procured, otherwise than in good faith and to secure a proper investigation for the discovery of the stolen goods.

The words alleged as slanderous were spoken by the defendant on that occasion, in reply to the inquiry of the mother as to "what they wanted," and in explanation of their visit. They all related to the subject-matter of the supposed theft, and the grounds which the defendant had to suspect the plaintiff. This statement furnishes the conditions which establish the legal position of "privilege," rebutting the presumption of malice which the law would otherwise imply, and making it incumbent upon the plaintiff to show malice in fact in order to recover.

The broad general principle is carefully stated in the case of *Toogood v. Spyring*, 4 Tyrwh. 582, which is referred to in nearly all the later decisions upon this subject, and its doctrines have been quoted and approved by this court in *Swan v. Tappan*, 5 Cush. 104, and *Gassett v. Gilbert*, 6 Gray, 94. A narrower statement, applicable to the facts of the present case, is made by Lord Ellenborough in *Delany v. Jones*, 4 Esp. 191, namely: "If done bona fide, as with a view of investigating a fact, in which the party making it is interested, it is not libellous." To the same effect are *Padmore v. Lawrence*, 11 Ad. & El. 380, and *Fowler v. Homer*, 3 Camp. 294. In *Blackham v. Pugh*, 2 C. B. 620, Chief Justice Tindal says: "A communication made by a person immediately concerned in interest in the subject matter to which it relates, for the purpose of protecting his own interest, in the full belief that the communication is true and without any malicious motive, is held to be excused from responsibility in an action for a libel."

This "privilege" is not defeated by the mere fact that the statements were made in the presence of others than the parties immediately interested nor that they were intemperate or excessive from overexcitement. *Toogood v. Spyring*, cited above; *Dunman v. Bigg*, 1 Camp. 269.

Whether the subject-matter to which the communications relate the interest in it of the party making them, or his relations to it, are such as to furnish the excuse, is a question to be determined by the court, in the first instance, assuming that they were made in good faith, in the belief that they were true, and with no motive of malice.

If unnecessary publicity be given to the statements, or if they go beyond what is reasonable in imputing crime, these circumstances may tend to show malice in fact; as well as evidence that the defendant knew them to be false, or had no sufficient reason to believe them true, or that he improperly sought or used the occasion to utter the defamatory words. But, however strong the evidence from these sources may be, and however irresistible the conclusion of malice to be drawn therefrom, it is a conclusion of fact, and is to be drawn by the jury, and

not by the court. The judge who tried this cause instructed the jury that, if the defendant used the words alleged, he was liable, "although he may have believed them to be true and may have had no malicious design to defame the plaintiff." This ruling, as it seems, must have been based upon the ground, either that the occasion was not one which furnished the excuse of "privilege," or that the defendant had, by some abuse of the privilege, lost the benefit of its protection. If upon the former ground, we think it was wrong as matter of law, both upon the authorities and upon principle. If upon the latter, it was a question not for the court, but for the jury.

This case must be distinguished from those in which the party pleading the excuse of "privilege" is guilty of making use of the occasion to utter charges of a character foreign to its legitimate purpose. As, for instance, if this defendant had, in addition to his statements in relation to the supposed theft, gone on to criminate the plaintiff generally, or to accuse her of unchastity, it would then have been the duty of the court, in an action for uttering such charges, to instruct the jury that as to such words, not appropriate to the legitimate objects of the occasion, it furnished the defendant no excuse whatever. But in this case the language all related to the subject of the theft which they were investigating, and it should have been left to the jury to determine, upon all the circumstances of the case, whether the defendant was guilty of actual malice.

Exceptions sustained.

TRESPASS

I. To Land ¹

DOUGHERTY v. STEPP.

(Supreme Court of North Carolina, 1835. 18 N. C. 371.)

This was an action of trespass *quare clausum fregit*, tried at Buncombe on the last circuit, before his Honor Judge Martin. The only proof introduced by the plaintiff to establish an act of trespass was that the defendant had entered on the unenclosed land of the plaintiff, with a surveyor and chain carriers, and actually surveyed a part of it, claiming it as his own, but without marking trees or cutting bushes. This his honor held not to be a trespass, and the jury, under his instructions, found a verdict for the defendant, and the plaintiff appealed.

RUFFIN, C. J. In the opinion of the court, there is error in the instructions given to the jury. The amount of damages may depend on the acts done on the land, and the extent of injury to it therefrom. But it is an elementary principle that every unauthorised, and therefore unlawful entry, into the close of another, is a trespass. From every such entry against the will of the possessor, the law infers some damage; if nothing more, the treading down the grass or the herbage, or as here, the shrubbery. Had the locus in quo been under cultivation or enclosed there would have been no doubt of the plaintiff's right to recover. Now our courts have for a long time past held that, if there be no adverse possession, the title makes the land the owner's close. Making the survey and marking trees, or making it without marking, differ only in the degree, and not in the nature of the injury. It is the entry that constitutes the trespass. There is no statute, nor rule of reason, that will make a willful entry into the land of another, upon an unfounded claim of right, innocent, which one, who set up no title to the land, could not justify or excuse. On the contrary, the pretended ownership aggravates the wrong. Let the judgment be reversed, and a new trial granted.

PER CURIAM. Judgment reversed.

¹ For discussion of principles, see Chapin on Torts, §§ 75. 76.

HANNABALSON v. SESSIONS.

(Supreme Court of Iowa, 1902. 116 Iowa, 457, 90 N. W. 93,
93 Am. St. Rep. 250.)

Action at law to recover damages for an alleged assault and battery. It appeared that in a war of words the defendant had pushed the plaintiff's arm back from the defendant's side of a partition fence. There was a verdict and judgment for defendant, and plaintiff appeals.

WEAVER, J.² * * * It is also said that the court erred in instructing the jury that, if plaintiff leaned over the partition fence and attempted to interfere with the ladder, defendant had the right to use such force upon her as was reasonably necessary to cause her to desist, and to expel her from his premises. It is claimed that this instruction is wrong. * * * The general doctrine announced in the instruction is, in our judgment, correct. The mere fact that the plaintiff did not step across the boundary line does not make her any less a trespasser if she reached her arm across the line, as she admits she did. It is one of the oldest rules of property known to the law that the title of the owner of the soil extends, not only downward to the center of the earth, but upward usque ad cœlum, although it is, perhaps, doubtful whether owners as quarrelsome as the parties in this case will ever enjoy the usufruct of their property in the latter direction. The maxim, "Ubi pars est ibi est totum"—that where the greater part is, there is the whole—does not apply to the person of the trespasser, and the court and jury could therefore not be expected to enter into any inquiry as to the side of the boundary line upon which plaintiff preponderated, as she reached over the fence top. It was enough that she thrust her hand or arm across the boundary to technically authorize the defendant to demand that she cease the intrusion, and to justify him in using reasonable and necessary force required for the expulsion of so much of her person as he found upon his side of the line, being careful to keep within the limits of the rule, "Molliter manus imposuit," so far as was consistent with his own safety. Under the instructions of the court, the jury must have found that defendant kept within the scope of his legal rights in this respect, and that the alleged assault was not established by the evidence.

The judgment of the district court is affirmed.

² The statement of the case is abridged and part of the opinion omitted.

II. To Chattels¹

WINTRINGHAM v. LAFÖY.

(Supreme Court of New York, 1827. 7 Cow. 735.)

On error from the C. P. of the City and County of N. Y. The action in the court below was trespass *de bonis asportatis* by Lafoy against Wintringham. It appeared on the trial that Wintringham was a constable, who held a *fi. fa.* issued by the Marine Court of the city, against the goods and chattels of one Gallis, and that Jan. 19, 1826, he levied on the articles in question, consisting of jewelry in the store occupied by Gallis, who was present at the levy. That Gallis informed the defendant below that the goods had been assigned by him (Gallis), and the defendant below said he was indemnified. That Gallis placed the articles on the glass case, so that the defendant below might look at them to ascertain their value. That the defendant below made an inventory, and said he would remove the goods, unless security was given that they would be forthcoming, to answer the execution. That security was, therefore, given, and the articles were left in the store. It further appeared that Dec. 21, 1825, Gallis had executed an assignment of all his property to the plaintiff below, Lafoy, for the purpose, first, of paying law expenses, then the debt of the plaintiff below, then certain other creditors named, and then the rest of his creditors. * * *

SAVAGE, C. J.⁴ It is not denied that a debtor in failing circumstances may prefer one of his creditors, or one set of creditors to another; nor is it pretended that any fraud in fact was proved in the court below. Indeed this was negatived by the proof and verdict of the jury. * * *

Was there any evidence of a trespass? If a sheriff takes the goods of a stranger, he is liable in this action. It is contended, however, that admitting the goods to belong to the plaintiff, the defendant did no tortious act. Every unlawful interference, by one person with the property or person of another, is a trespass. The defendant in the court below undertook to control the property levied on. He took it into his possession, though there was no manual seizing of it. He was about to take it away, and could have done so, but for the security given him that it should be forthcoming upon the execution. He exercised dominion over it. This was enough to constitute him a trespasser, he having no authority. Trover lies against a defendant who undertakes

¹ For discussion of principles, see Chapin on Torts, §§ 75, 76.

⁴ The statement of facts is abridged and part of the opinion is omitted.

to control property in defiance or exclusion of the owner. *Reynolds v. Shuler*, 5 Cow. 325, 326, and cases cited. The same doctrine is applicable in trespass, as in trover, where the conversion is the tortious intermeddling with the goods of another.

The judgment must be affirmed.

III. Ab Initio ⁵

THE SIX CARPENTERS' CASE.

(Court of King's Bench, 1610. 8 Coke Rep. 146 a, 77 Reprint, 695.)

In trespass brought by John Vaux against Thomas Newman, carpenter, and five other carpenters, for breaking his house, and for an assault and battery, 1 Sept. 7 Jac. in London, in the parish of St. Giles extra Cripplegate, in the ward of Cripplegate, etc., and upon the new assignment, the plaintiff assigned the trespass in a house called the Queen's Head. The defendants to all the trespass *præter fractionem domus* pleaded not guilty; and as to the breaking of the house said, that the house *præd' tempore quo*, etc., *et diu antea et postea*, was a common wine tavern, of the said John Vaux, with a common sign at the door of the said house fixed, etc., by force whereof the defendants, *præd' tempore quo*, etc., viz. *hora quarta post meridiem* into the said house, the door thereof being open, did enter, and did there buy and drink a quart of wine, and there paid for the same, etc. The plaintiff, by way of replication, did confess, that the said house was a common tavern, and that they entered into it, and bought and drank a quart of wine, and paid for it: but further said, that one John Ridding, servant of the said John Vaux, at the request of the said defendants, did there then deliver them another quart of wine, and a pennyworth of bread, amounting to 8d. and then they there did drink the said wine, and eat the bread, and upon request did refuse to pay for the same: upon which the defendants did demur in law: and the only point in this case was, if the denying to pay for the wine, or the nonpayment, which is all one (for every nonpayment upon request, is a denying in law) makes the entry into the tavern tortious.

And first it was resolved ⁶ when an entry, authority, or license, is given to any one by the law, and he doth abuse it, he shall be a trespasser *ab initio*; but where an entry, authority, or license is given by the party, and he abuses it, there he must be punished for his abuse, but shall not be a trespasser *ab initio*. And the reason of this difference is that

⁵ For discussion of principles, see Chapin on Torts, § 77.

⁶ A portion of the opinion is omitted.

in the case of a general authority or license of law, the law adjudges by the subsequent act, *quo animo*, or to what intent, he entered; for *acta exteriora indicant interiora secreta*. Vide 11 H. 4, 75 b. But when the party gives an authority or license himself to do anything, he cannot, for any subsequent cause, punish that which is done by his own authority or license, and therefore the law gives authority to enter into a common inn, or tavern, so to the lord to distrain; to the owner of the ground to distrain damage-feasant; to him in reversion to see if waste be done; to the commoner to enter upon the land to see his cattle, and such like. Vide 12 E. 4, 8 b; 21 E. 4, 19 b; 5 H. 7, 11 a; 9 H. 6, 29 b; 11 H. 4, 75 b; 3 H. 7, 15 b; 28 H. 6, 5 b. But if he who enters into the inn or tavern doth a trespass, as if he carries away anything; or if the lord who distrains for rent, or the owner for damage-feasant, works or kills the distress; or if he who enters to see waste breaks the house, or stays there all night; or if the commoner cuts down a tree, in these and the like cases, the law adjudges that he entered for that purpose; and because the act which demonstrates it is a trespass, he shall be trespasser *ab initio* as it appears in the said books. So if a purveyor takes my cattle by force of a commission, for the King's house, it is lawful; but if he sells them in the market, now the first taking is wrongful; and therewith agrees 18 H. 6, 19 b. Et sic de similibus.

It was resolved *per totam curiam* that not doing cannot make the party who has authority or license by the law a trespasser *ab initio*, because not doing is no trespass, and, therefore, if the lessor distrains for his rent, and thereupon the lessee tenders him the rent and arrears, etc., and requires his beasts again, and he will not deliver them, this not doing cannot make him a trespasser *ab initio*; and therewith agrees 33 H. 6, 47 a. So if a man takes cattle damage-feasant, and the other offers sufficient amends and he refuses to redeliver them, now, if he sues a replevin, he shall recover damages only for the detaining of them, and not for the taking, for that was lawful; and therewith agrees F. N. B. 69, g. temp. E. 1; Replevin 27; 27 E. 3, 88; 45 E. 3, 9. So in the case at bar, for not paying for the wine, the defendants shall not be trespassers, for the denying to pay for it is no trespass, and therefore they cannot be trespassers *ab initio*; and therewith agrees directly in the point 12 Edw. 4, 9 b. For there Pigot, Serjeant, puts this very case, if one comes into a tavern to drink, and when he has drunk he goes away, and will not pay the taverner, the taverner shall have an action of trespass against him for his entry. To which Brian, Chief Justice, said, the said case which Pigot has put is not law, for it is no trespass but the taverner shall have an action for debt. * * *

CONVERSION

I. Denial of Right Essential¹

SHEA v. INHABITANTS OF MILFORD.

(Supreme Judicial Court of Massachusetts, 1888. 145 Mass. 525, 14 N. E. 769.)

Tort for the conversion of personal property by plaintiff, Shea, against the inhabitants of the town of Milford. Trial in the superior court, where the jury returned a verdict for the defendant, and the plaintiff alleged exceptions.

ALLEN, J. The property of the plaintiff alleged to have been converted by the defendants was on land belonging to and occupied by the defendant town. The town requested the plaintiff to remove the property to another place on the same parcel of land, and the plaintiff refused to do so, whereupon the defendants removed it to the place assigned by the town. The instruction that if the plaintiff unreasonably neglected to remove the property, and the defendants removed it to another part of the lot, doing no unnecessary damage, the plaintiff could not recover, was sufficiently favorable to the plaintiff, even if he occupied under a license which had not been revoked. The evidence negatived a conversion of the property by the defendants, and showed that they claimed no title to it, assumed no dominion over it, and did nothing in derogation of the plaintiff's title to it, and that all that was claimed by the defendants was the right to remove the goods from one place to another on their own land. All that was done was in assertion of their right in the land, and in recognition of the plaintiff's right of property in the chattels. If the plaintiff had the right to occupy the land which he claimed, the act of the defendants was wrongful, and they would be liable to the plaintiff for damages for breach of contract, or for the trespass, but not for the value of property converted to their own use. *Farnsworth v. Lowery*, 134 Mass. 512; *Fouldes v. Willoughby*, 8 Mees. & W. 540; *Heald v. Carey*, 11 C. B. 977. It is immaterial whether the plaintiff had an unrevoked license to occupy the land, and we express no opinion upon that question. Exceptions overruled.

¹ For discussion of principles, see Chapin on Torts, §§ 81-83.

II. Nonfeasance is Insufficient²

DAVIS v. HURT.

(Supreme Court of Alabama, 1897. 114 Ala. 146, 21 South. 468.)

Trover by Peter T. Hurt against W. F. Davis & Son to recover damages for the alleged conversion by the defendants of three bales of cotton. Issue was joined upon the plea of the general issue. From a judgment for plaintiff, defendants appeal. Reversed.

On the trial of the cause, as is shown by the bill of exceptions, the testimony for the plaintiff tended to show that he had purchased from certain parties warehouse certificates for three bales of cotton, which the holders of said certificates had stored with the defendants; that these certificates belonged to the plaintiff; and that subsequently, upon his making demand upon the defendants for the cotton which said certificates represented, the defendants were unable to find the cotton in their warehouse, and that, after diligent search by the plaintiff's agent and the defendants, the cotton was never found. It was further shown that the plaintiff had instructed the defendants to ship to his cotton merchant 45 bales of cotton, in which were included the 3 bales involved in this suit, and that only 42 bales of cotton were received by his cotton merchants; the 3 bales which were not received being those involved in this suit. The testimony for the defendants tended to show that the defendants made a search for the cotton, with the agent of the plaintiff, and failed to find it, and that they afterwards made a diligent search in their warehouse for said cotton without finding it, and that the cotton was never shipped by the defendants, after a demand was made by the plaintiff for said cotton, nor was it delivered to any one else; and that the cotton was not in the possession of the defendants at the time the suit was brought. Upon the introduction of all the evidence, the court, of its own motion, instructed the jury as follows: "If the jury believe from the evidence that the cotton in controversy was stored with the defendants as warehousemen for a reward, and the said defendants, upon demand, failed to deliver said cotton, or to account for its absence, then the defendants are liable in this action to the plaintiff for the value of the cotton and interest thereon from the time of such demand." To the giving of this part of the court's general charge the defendants duly excepted, and also separately excepted to the court's giving, at the request of the plaintiff, the following written charges: (2) "That if the jury believe from all the evidence that, through negligence, defendants delivered the cotton to other parties, or shipped or disposed of it in violation of the or-

² For discussion of principles, see Chapin on Torts, § 82.

ders of plaintiff, then they must find for the plaintiff, if plaintiff has never recovered cotton, or been paid for it." (3) "That there must be some evidence before the jury that the cotton was stolen, before the jury can consider that theory as a part of this case." (4) "In order to sustain trover, it is not necessary to show that the wrongful disposition, appropriation, wasting, or destruction was criminal. It is only necessary to show that the disposition, etc., was made in violation of the property or possession of plaintiff by the defendants." The defendants requested the court to give to the jury the following written charges, and separately excepted to the court's refusal to give each of them as asked: (2) "Before the jury can find for the plaintiff in this case, they must be satisfied from the evidence that the defendants exercised some unlawful assumption or dominion over the cotton in controversy in defiance or exclusion of the plaintiff's right; or else that the defendants withheld the possession of said cotton from the plaintiff, claiming the title to said cotton in themselves, or inconsistent with the right of the plaintiff." (3) "Before the jury can find for the plaintiff in this case, they must be satisfied from the evidence that the defendants have either appropriated the cotton in controversy to their own use and enjoyment, or have destroyed it, or are exercising control of it in exclusion and defiance of the plaintiff's title, or are withholding the possession thereof from the plaintiff under a claim of title in themselves inconsistent with the plaintiff's claim." (4) "The burden of proof in the case is on the plaintiff to satisfy the jury from the evidence that the defendants have been guilty of the conversion of the three bales of cotton in controversy, and a mere failure to deliver the cotton on demand is not sufficient evidence of a conversion without more." (5) "Mere nondelivery by a warehouseman of cotton stored with him, on demand, will not support this action. There must be a conversion of the cotton by the warehouseman." The defendants assign as error the rulings of the court upon the charges.

BRICKELL, C. J. Warehousemen are of the class of bailees bound to ordinary diligence, and, of consequence, liable only for losses occurring from the want of ordinary care. When, however, upon demand made, the bailee fails to deliver goods intrusted to his care, or does not account for the failure to make delivery, *prima facie* negligence will be imputed to him; and the burden of proving loss without the want of ordinary care devolves upon him. *Seals v. Edmondson*, 71 Ala. 509; *Prince v. State Fair*, 106 Ala. 340, 17 South. 449, 28 L. R. A. 716; *Claffin v. Meyer*, 75 N. Y. 260; *Id.*, 31 Am. Rep. 467; *Boies v. Railroad Co.*, 37 Conn. 272; *Id.*, 9 Am. Rep. 347. The rule is founded in necessity, and upon the presumption that a party who, from his situation, has peculiar, if not exclusive, knowledge of facts, if they exist, is best able to prove them. If the bailee to whose possession, control, and care goods are intrusted will not account for the failure or refusal to deliver them on demand of the bailor, the presumption is not violent that he has been wanting in diligence, or that

he may have wrongfully converted, or may wrongfully detain them. Or, if there be injury to or loss of them during the bailment, it is but just that he be required to show the circumstances, acquitting himself of the want of diligence it was his duty to bestow. When the bailee fails to return the goods on demand, the principal has an election of remedies. He may sue in assumpsit for a breach of the contract, or in case for negligence, or, if there has been a conversion of the goods, in trover for the conversion. Story, Bailm. §§ 191-269; *Bank v. Wheeler*, 48 N. Y. 492; *Id.*, 8 Am. Rep. 564; *Magnin v. Dinsmore*, 70 N. Y. 410; *Id.*, 26 Am. Rep. 608. The gist of the action of trover is the conversion. The right of property may reside in the plaintiff, entitling him to pursue other remedies, but trover cannot be pursued without evidence of a conversion of the goods. *Glaze v. McMillion*, 7 Port. 279; *Conner v. Allen*, 33 Ala. 515; *Bolling v. Kirby*, 90 Ala. 215, 7 South. 914, 24 Am. St. Rep. 789. In *Conner v. Allen*, supra, it was said by Rice, C. J.: "Trover is one of the actions the boundaries of which are distinctly marked and carefully preserved by the Code. A conversion is now, as it has ever been, the gist of that action; and, without proof of it, the plaintiff cannot recover, whatever else he may prove, or whatever may be his right of recovery in another form of action." And he adopts the definition or description of a conversion given by Mr. Greenleaf: "A conversion, in the sense of the law of trover, consists either in the appropriation of the thing to the party's own use and beneficial enjoyment, or in its destruction, or in exercising dominion over it in exclusion or defiance of the plaintiff's right, or in withholding the possession from the plaintiff under a claim of title inconsistent with his own." 2 Greenl. Ev. § 642. In *Glaze v. McMillion*, supra, it was said: "It is believed that all conversions may be divided into four distinct classes: (1) By a wrongful taking, (2) by an illegal assumption of ownership, (3) by an illegal user or misuser, (4) by a wrongful detention." In *Bolling v. Kirby*, supra, there was a very full examination of the authorities, and discussion of the essential elements or facts which must concur to constitute conversion in the sense of the law of trover, by McClellan, J., and the result declared was that "conversion upon which recovery in trover may be had must be a positive, tortious act. Nonfeasance, or neglect of legal duty, mere failure to perform an act obligatory by contract, or by which property is lost to the owner, will not support the action." The case is republished, with elaborate and instructive annotation by Mr. Freeman, 24 Am. St. Rep. 789-819. In *Railroad Co. v. Kidd*, 35 Ala. 209, it was held that "trover will not lie for a bare non-delivery of goods by a warehouseman, unless they are in his possession, and he refuses to deliver them on demand." In *Abraham v. Nunn*, 42 Ala. 51, it was held that trover would not lie against a warehouseman for the conversion of goods taken from his possession by an armed force, without negligence or complicity on his part. In *Bank*

v. Wheeler, *supra*, the defendant had received for acceptance certain bills of exchange, and, at the demand of the person intrusting them to him, failed to return them, saying he could not find them, and might have torn them up with papers he considered of no value. It was held he was not liable in trover, there being no evidence of a voluntary or intentional destruction or loss of the bills; though he was liable upon his implied promise to present the bills for acceptance; and, if not accepted or paid, to give notice to the plaintiff.

Without pursuing further an examination of authorities, it may safely be said that a mere failure by a bailee, on demand made, to deliver goods which have been intrusted to him, is not a conversion which will support an action of trover, if he sets up no title hostile to or inconsistent with the title of the bailor, or has not appropriated them to his own use, or to the use of a third person, or exercised over them a dominion inconsistent with the bailment. All that can be fairly predicated of the facts found in the record is the mere failure to deliver the cotton upon the demand of the plaintiff, possession of it not remaining with the defendant. There was no denial of the title of the plaintiff, nor dominion exercised over the cotton inconsistent with the terms of the bailment; no evidence of a conversion or appropriation of it to their own use or to the use of any third person by the defendants. The failure to deliver, unexplained, raises a presumption of negligence against them, and may involve them in a liability for a breach of the contract of bailment, or for negligence in the performance of the duty springing from the contract; but it is not the conversion—the positive, tortious act—indispensable to maintain trover. From this view it results there was error in the instruction given voluntarily by the court below. The second, third, and fourth instructions given at the instance of the plaintiff do not, as is obvious from what we have said, find support in the evidence, and for that reason ought not to have been given, as their immediate tendency was to mislead the jury. The second, third, fourth, and fifth instructions requested by the defendant should have been given. Let the judgment be reversed, and the cause remanded for further proceedings in conformity to this opinion.

III. Exercise of Dominion *

SWIM v. WILSON.

(Supreme Court of California, 1891. 90 Cal. 126, 27 Pac. 33, 13 L. R. A. 605, 25 Am. St. Rep. 110.)

DE HAVEN, J. The plaintiff was the owner of 100 shares of stock of a mining corporation, issued to one H. B. Parsons, trustee, and properly indorsed by him. This stock was stolen from plaintiff by an employé in his office, and delivered for sale to the defendant, who was engaged in the business of buying and selling stocks on commission. At the time of placing the stock in defendant's possession, the thief represented himself as its owner, and the defendant relying upon this representation, in good faith, and without any notice that the stock was stolen, sold the same in the usual course of business, and subsequently, still without any notice that the person for whom he had acted in making the sale was not the true owner, paid over to him the net proceeds of such sale. Thereafter the plaintiff brought this action to recover the value of said stock, alleging that the defendant had converted the same to his own use, and, the facts as above stated appearing, the court in which the action was tried gave judgment against defendant for such value, and from this judgment, and an order refusing him a new trial, the defendant appeals. It is clear that the defendant's principal did not by stealing plaintiff's property acquire any legal right to sell it, and it is equally clear that the defendant, acting for him and as his agent, did not have any greater right, and his act was therefore wholly unauthorized, and in law was a conversion of plaintiff's property. "It is no defense to an action of trover that the defendant acted as the agent of another. If the principal is a wrongdoer, the agent is a wrongdoer also. A person is guilty of a conversion who sells the property of another without authority from the owner, notwithstanding he acts under the authority of one claiming to be the owner, and is ignorant of such person's want of title." *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581; *Coles v. Clark*, 3 Cush. (Mass.) 399; *Koch v. Branch*, 44 Mo. 542, 100 Am. Dec. 324. In *Stephens v. Elwall*, 4 Maule & S. 259, this principle was applied where an innocent clerk received goods from an agent of his employer, and forwarded them to such employer abroad; and, in rendering his decision on the case presented, Lord Ellenborough uses this language: "The only question is whether this is a conversion in the clerk, which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit, when he sent the goods to his master; but,

* For discussion of principles, see Chapin on Torts, § 82.

nevertheless, his acts may amount to a conversion; for a person is guilty of conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under the authority of another, who had himself no authority to dispose of it." To hold the defendant liable, under the circumstances disclosed here, may seem upon first impression to be a hardship upon him. But it is a matter of everyday experience that one cannot always be perfectly secure from loss in his dealings with others, and the defendant here is only in the position of a person who has trusted to the honesty of another, and has been deceived. He undertook to act as agent for one whom it now appears was a thief, and, relying on his representations, he aided his principal to convert the plaintiff's property into money, and it is no greater hardship to require him to pay to the plaintiff the value of this property than it would be to take it away from the innocent vendee who purchased and paid for it. And yet it is universally held that the purchaser of stolen chattels, no matter how innocent or free from negligence in the matter, acquires no title to such property as against the owner, and this rule has been applied in this court to the innocent purchaser of shares of stock. *Barstow v. Mining Co.*, 64 Cal. 388, 1 Pac. 349, 49 Am. Rep. 705; *Sherwood v. Mining Co.*, 50 Cal. 413.

The precise question involved here arose in the case of *Bercich v. Marye*, 9 Nev. 312. In that case, as here, the defendant was a stockholder who had made a sale of stolen certificates of stock for a stranger, and paid him the proceeds. He was held liable, the court in the course of its opinion saying: "It is next objected that, as the defendant was the innocent agent of the person for whom he received the shares of stock, without knowledge of the felony, no judgment should have been rendered against him. It is well settled that agency is no defense to an action of trover, to which the present action is analogous." The same conclusion was reached in *Kimball v. Billings*, 55 Me. 147, 92 Am. Dec. 581, the property sold in that case by the agent being stolen government bonds, payable to bearer. The court there said: "Nor is it any defense that the property sold was government bonds payable to bearer. The bona fide purchaser of a stolen bond payable to bearer might perhaps defend his title against even the true owner. But there is no rule of law that secures immunity to the agent of the thief in such cases, nor to the agent of one not a bona fide holder. * * * The rule of law protecting bona fide purchasers of lost or stolen notes and bonds payable to bearer has never been extended to persons not bona fide purchasers, nor to their agents." Indeed, we discover no difference in principle between the case at bar and that of *Rogers v. Huje*, 1 Cal. 429, 54 Am. Dec. 300, in which case, Bennett, J., speaking for the court, said: "An auctioneer who receives and sells stolen property is liable for the conversion to the same extent as any other merchant or individual. This is so both upon principle and authority. Upon principle, there is no reason why he should be exempted from liability. The person to whom he sells, and who has

paid the amount of the purchase money, would be compelled to deliver the property to the true owner or pay him its full value; and there is no more hardship in requiring the auctioneer to account for the value of the goods than there would be in compelling the right owner to lose them, or the purchaser from the auctioneer to pay for them." It is true that this same case afterwards came before the court, and it was held, in an opinion reported in 2 Cal. 571, 56 Am. Dec. 363, that an auctioneer, who in the regular course of his business receives and sells stolen goods, and pays over the proceeds to the felon, without notice that the goods were stolen, is not liable to the true owner as for a conversion. This latter decision, however, cannot be sustained on principle, is opposed to the great weight of authority, and has been practically overruled in the later case of *Cerkel v. Waterman*, 63 Cal. 34. In that case the defendants, who were commission merchants, sold a quantity of wheat, supposing it to be the property of one Williams, and paid over to him the proceeds of the sale before they knew of the claim of the plaintiff in that action. There was no fraud or bad faith, but the court held the defendants there liable for the conversion of the wheat. In this case it was the duty of the defendant to know for whom he acted, and, unless he was willing to take the chances of loss, to have satisfied himself that his principal was able to save him harmless if in the matter of his agency he incurred a liability by the conversion of property not belonging to such principal. Judgment and order affirmed.

We concur: GAROUTTE, J.; MCFARLAND, J.; SHARPSTEIN, J.

We dissent: BEATTY, C. J.; PATERSON, J.

IV. Conversion by Agent *

LAVERTY v. SNETHEN.

(Court of Appeals of New York, 1877. 68 N. Y. 522, 23 Am. Rep. 184.)

CHURCH, C. J. The defendant received a promissory note from the plaintiff, made by a third person, and indorsed by the plaintiff, and gave a receipt therefor, stating that it was received for negotiation and the note to be returned the next day or the avails thereof. The plaintiff testified, in substance, that he told the defendant not to let the note go out of his reach without receiving the money. The defendant, after negotiating with one Foote about buying the note, delivered the note to him under the promise that he would get it discounted, and return the money to defendant, and he took away the

* For discussion of principles, see Chapin on Torts, § 82.

note for that purpose. Foote did procure the note to be discounted, but appropriated the avails to his own use.

The court charged that, if the jury believed the evidence of the plaintiff in respect to instructing the defendant not to part with the possession of the note, the act of defendant in delivering the note, and allowing Foote to take it away, was a conversion in law, and the plaintiff was entitled to recover. The exception has been criticised as applying to two propositions, one of which was unobjectionable, and therefore not available. Although not so precise as is desirable, I think that the exception was intended to apply to the proposition above stated, and was sufficient. The question as to when an agent is liable in trover for conversion is sometimes difficult. The more usual liability of an agent to the principal is an action of assumpsit, or what was formerly termed an action on the case for neglect or misconduct, but there are cases when trover is the proper remedy. Conversion is defined to be an unauthorized assumption and exercise of the right of ownership over goods belonging to another, to the exclusion of the owner's rights. A constructive conversion takes place when a person does such acts in reference to the goods of another as amount in law to appropriation of the property to himself. Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred in case a limited authority has been given, with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion. Bouv. Law Dict. title "Conversion." Savage, C. J., in *Spencer v. Blackman*, 9 Wend. 167, defines it concisely as follows: "A conversion seems to consist in any tortious act by which the defendant deprives the plaintiff of his goods." In this case the plaintiff placed the note in the hands of the defendant for a special purpose not only, but with restricted authority (as we must assume from the verdict of the jury) not to part with the possession of the note without receiving the money. The delivery to Foote was unauthorized and wrongful, because contrary to the express directions of the owner. The plaintiff was entitled to the absolute dominion over this property as owner. He had a right to part with so much of that dominion as he pleased. He did part with so much of it as would justify the defendant in delivering it for the money in hand, but not otherwise. The act of permitting the note to go out of his possession and beyond his reach was an act which he had no legal right to do. It was an unlawful interference with the plaintiff's property, which resulted in loss, and that interference and disposition constituted, within the general principles referred to, a conversion; and the authorities, I think, sustain this conclusion by a decided weight of adjudication. A leading case is *Syeds v. Hay*, 4 Term R. 260, where it was held that trover would lie against the master of a vessel who had landed goods of the plaintiff contrary to the plaintiff's orders, though the plaintiff might have had them by sending for them, and paying the wharfage. Butler, J., said: "If one man who is

intrusted with the goods of another put them into the hands of a third person, contrary to orders, it is a conversion." This case has been repeatedly cited by the courts of this state as good law, and has never, to my knowledge, been disapproved, although it has been distinguished from another class of cases upon which the defendant relies, and which will be hereafter noticed.

In *Spencer v. Blackman*, 9 Wend. 167, a watch was delivered to the defendant to have its value appraised by a watchmaker. He put it into the possession of the watchmaker, when it was levied upon by virtue of an execution, not against the owner, and it was held to be a conversion. *Savage, C. J.*, said: "The watch was intrusted to him for a special purpose, to ascertain its value. He had no orders or leave to deliver it to Johnson, the watchmaker, nor any other person." So, when one hires a horse to go an agreed distance, and goes beyond that distance, he is liable in trover for a conversion. *Wheelock v. Wheelwright*, 5 Mass. 103. So when a factor in Buffalo was directed to sell wheat at a specified price, on a particular day, or ship it to New York, and did not sell or ship it that day, but sold it the next day at the price named, held that, in legal effect, it was a conversion. *Scott v. Rogers*, 31 N. Y. 676. See, also, *Addison on Torts*, 310, and cases there cited.

The cases most strongly relied upon by the learned counsel for the appellant are *Dufresne v. Hutchinson*, 3 Taunt. 117, and *Sarjeant v. Blunt*, 16 Johns. 73, holding that a broker or agent is not liable in trover for selling property at a price below instructions. The distinction in the two classes of cases, I apprehend, is that in the latter the agent or broker did nothing with the property but what he was authorized to do. He had a right to sell and deliver the property. He disobeyed instructions as to price only, and was liable for misconduct, but not for conversion of the property—a distinction which, in a practical sense, may seem technical, but is founded probably upon the distinction between an unauthorized interference with the property itself and the avails or terms of sale. At all events, the distinction is fully recognized and settled by authority. In the last case *Spencer, J.*, distinguished it from *Syeds v. Hay*, *supra*. He said: "In the case of *Syeds v. Hay*, 4 Term R. 260, the captain disobeyed his orders in delivering the goods. He had no right to touch them for the purpose of delivering them on that wharf."

The defendant had a right to sell the note, and if he had sold it at a less price than that stipulated, he would not have been liable in this action; but he had no right to deliver the note to Foote to take away, any more than he had to pay his own debt with it. Morally there might be a difference, but in law both acts would be a conversion, each consisting in exercising an unauthorized dominion over the plaintiff's property. *Palmer v. Jarmain*, 2 M. & W. 282, is plainly distinguishable. There the agent was authorized to get the note discounted, which he did, and appropriated the avails. *Parke, B.*, said: "The defendant

did nothing with the bill which he was not authorized to do." So in *Cairnes v. Bleecker*, 12 Johns. 300, where an agent was authorized to deliver goods on receiving sufficient security, and delivered the goods on inadequate security, it was held that trover would not lie, for the reason that the question of the sufficiency of the security was a matter of judgment. In *McMorris v. Simpson*, 21 Wend. 610, Bronson, J., lays down the general rule that the action of trover "may be maintained when the agent has wrongfully converted the property of his principal to his own use, and the fact of conversion may be made out by showing either a demand and refusal, or that the agent has without necessity sold or otherwise disposed of the property, contrary to his instructions. When an agent wrongfully refuses to surrender the goods of his principal, or wholly departs from his authority in disposing of them, he makes the property his own, and may be treated as a tortfeasor." The result of the authorities is that, if the agent parts with the property in a way or for a purpose not authorized, he is liable for a conversion; but if he parts with it in accordance with his authority, although at less price, or if he misapplies the avails, or takes inadequate for sufficient security, he is not liable for a conversion of the property, but only in an action on the case for misconduct. It follows that there was no error in the charge. The question of good faith is not involved. A wrongful intent is not an essential element of the conversion. It is sufficient if the owner has been deprived of his property by the act of another assuming an unauthorized dominion and control over it. *Boyce v. Brockway*, 31 N. Y. 490. It is also insisted that the parol evidence of instructions not to part with the note was incompetent to vary the terms of the contract contained in the receipt. This evidence was not objected to not only, but the point was not taken in any manner. The attention of the court was not called to it, and the court made no decision in respect to it. * * * All concur.

Judgment affirmed.

V. Unlawful Detention

1. UNQUALIFIED REFUSAL⁶

BOARDMAN v. SILL.

(At Nisi Prius. Sittings after Michaelmas Term, 49 Geo. III, 1 Campb. 410, note.)

Trover for some brandy, which lay in the defendant's cellars and which when demanded he had refused to deliver up, saying it was his own property. At this time certain warehouse rent was due to

⁵ The remainder of the opinion is omitted.

⁶ For discussion of principles, see Chapin on Torts, § 82.

the defendant on account of the brandy of which no tender had been made to him. The Attorney-General contended that the defendant had a lien on the brandy for the warehouse rent, and that till this was tendered, trover would not lie. But LORD ELLENBOROUGH considered that, as the brandy had been detained on a different ground and as no demand of warehouse rent had been made, the defendant must be taken to have waived his lien, if he had one, which would admit of some doubt. The plaintiff had a verdict.

STEELE v. MARSICANO.

(Supreme Court of California, 1894. 102 Cal. 666, 36 Pac. 920.)

HARRISON, J. The defendant carries on the business of packing fruit at a warehouse on Battery street, in San Francisco, under the name of Overland Packing Company, and is also the president of the American Salt Company, and has his office or headquarters at the office of that corporation, on Sacramento street, in that city. On March 19, 1892, a man named Laton visited the office of the salt company, and inquired for the defendant, saying that he wished to store some sugar with him at his place on Sacramento street. The defendant was absent from San Francisco, and the clerk in charge told him that they had no room; and, on his inquiring whether he could store it with the Overland Packing Company for a few days, the clerk, at his request, knowing that he was acquainted with defendant, telephoned the inquiry to that place, and received an affirmative reply. Laton then visited the Overland Packing Company's place, and, upon seeing where the sugar was to be stored, said he would send it up. He then went to the office of the plaintiffs, representing himself to be a broker for the defendant, and negotiated the purchase in his name of 21 tons of sugar, and directed that it be delivered to the Overland Packing Company. The plaintiffs employed their own drayman for that purpose, and when he reached the packing company's place, on Battery street, the foreman of that place, and one of his men, took it on the trucks and ran it into the building; and a receipt for its delivery was given to the drayman, in the name of the Overland Packing Company. The sugar was delivered on the 22d of March, but the defendant did not learn of its delivery until two days thereafter, when he immediately directed his foreman to tell Laton to take the sugar away, which he did, and Laton removed the sugar the next day. On the Monday following, which was collection day, the defendant received from the plaintiffs a statement of his account or purchase of the sugar, and immediately visited the office of the plaintiffs, and denied having made such purchase. The record does not show whether the plaintiffs made any explanation of the transaction with Laton, or what steps they took to investigate the transaction; but they seem to have become satisfied that the purchase

of the sugar had not been authorized by the defendant, as instead of bringing an action against the defendant for its value, they made a formal demand upon him, about two weeks later, for its redelivery, and then brought this action, charging him with the conversion of the sugar. Judgment was rendered in the court below in favor of the plaintiffs, and the defendant has appealed.

In order to charge the defendant with the conversion of the plaintiffs' goods, he must be shown to have done some act implying the exercise or assumption of title, or of a dominion over the goods, or some act inconsistent with the plaintiffs' right of ownership, or in repudiation of such right. A simple act of intermeddling with another's property, which does not imply any assertion of title or dominion over the property, and which is done in ignorance of the owner's claim thereto, and without any intention to deprive him of it, will not constitute a conversion. If I find a horse in my lot, I am not guilty of its conversion if I turn it into the highway. Nor is the warehouseman, who receives goods from a wrongdoer, and afterwards redelivers them to him, in ignorance of the claim of another, guilty of their conversion. Conversion is a tort, and, to establish it, there must be a tortious act. "If a bailee have the temporary possession of property, holding the same as the property of the bailor, and asserting no title in himself, and in good faith, in fulfillment of the terms of the bailment, either as expressed by the parties or implied by law, restores the property to the bailor before he is notified that the true owner will look to him for it, no action will lie against him, for he has only done what was his duty." *Nelson v. Iverson*, 17 Ala. 216. See, also, *Burditt v. Hunt*, 25 Me. 422, 43 Am. Dec. 289. In *Parker v. Lomard*, 100 Mass. 408, where the defendant took possession of a warehouse in which there was certain cotton belonging to the plaintiff, but which the defendant, upon information to that effect received from his predecessor, entered upon his books as belonging to another, to whom he subsequently delivered it, it was held that he was not liable for its conversion. In *Hill v. Hayes*, 38 Conn. 532, some stolen money had been delivered to the defendant by the thief, to be kept for him. The defendant had no knowledge that the money had been stolen, and in a few days gave it to a third party, to be redelivered to her bailor; but it was held that she was not guilty of conversion. See, also, *Frome v. Dennis*, 45 N. J. Law, 515; *Loring v. Mulcahy*, 3 Allen (Mass.) 575; *Gurley v. Armstead*, 148 Mass. 267, 19 N. E. 389, 2 L. R. A. 80, 12 Am. St. Rep. 555. A demand of the property, and a refusal to deliver it, do not, of themselves, constitute conversion. They are merely evidence from which a conversion may be established, and, as evidence, may be repelled by proof that a compliance was impossible. *Hill v. Covell*, 1 N. Y. 522. A refusal is not evidence of conversion, unless the party had it in his power at the time to deliver up the goods. *Kelsey v. Griswold*, 6 Barb. (N. Y.) 436. In order to establish the conversion by mere proof of the demand and refusal, the plaintiff must also show

the ability of the defendant to comply with the demand at the time it is made. *Whitney v. Slauson*, 30 Barb. (N. Y.) 276; *Johnson v. Couillard*, 4 Allen (Mass.) 446.

Under these principles the judgment against the defendant cannot be sustained. As Laton had no authority to negotiate a purchase of the sugar for the defendant, the plaintiffs do not rely upon his pretended agency, but seek to charge the defendant with its conversion by reason of the acts done by himself; claiming that the delivery of the sugar to the defendant, and his subsequent refusal to redeliver it upon their demand, constitute such conversion. But the delivery of the sugar to the defendant was not the result of any act or authority on his part. It was delivered there at the instance of Laton, and must be considered as a delivery to Laton. As Laton had no authority to bind the defendant, his direction to the plaintiffs to deliver the sugar at the defendant's place of business, and their delivery in pursuance thereof, cannot create any obligations against the defendant in reference to the sugar. The taking of a receipt in the name of the Overland Packing Company is immaterial. It did not establish any relation of contract between the plaintiffs and the defendant; for it was shown by the plaintiffs that this delivery was made at the instance of Laton, and there was nothing in the receipt which indicated that the delivery was made in pursuance of a purchase on behalf of the defendant. The receipt was only a voucher to Laton that the plaintiffs had followed his direction, and had the same effect as though the sugar had been placed on board a vessel for transportation, or in some other warehouse, for which a drayman's receipt was given. It could not place the defendant under any obligation to the plaintiffs, for at the time of its delivery there was no statement on the part of the plaintiffs of the purpose with which it was brought to his place, and the defendant was justified in supposing that it was the sugar which Laton had requested might be placed there for a few days. The defendant must be considered as having received the sugar from Laton, and as his bailee. Before the defendant had any knowledge of the relation of the plaintiffs to the sugar, Laton had removed it from the defendant's packing house, at the direction of the defendant. This direction, and the removal, instead of being the exercise of any dominion or control over the sugar by the defendant, was for the purpose of avoiding its control, and freeing himself from any connection with it. It was restoring the sugar into the hands and under the control of the party by whom it had been placed upon his property, and was the reverse of assuming any dominion or claim to it. When, subsequently the defendant visited the plaintiffs' place of business, in response to the bill for the sugar which they had sent him, and disclaimed the purchase, the plaintiffs do not seem to have acquainted him with the facts of the transaction, and did not question his declaration that he had not made the purchase until some two weeks later, when they made a formal demand for its redelivery. As, at this time, it was not in his power to comply with

the demand, his refusal did not constitute a conversion; and as none of the previous acts done by him with reference to the sugar had been in the assertion of any dominion over it, or with any knowledge of the plaintiffs' rights, or from which any repudiation of their rights could be implied, he cannot be charged with the conversion. The judgment and order are reversed.

We concur: GAROUTTE, J.; VAN FLEET, J.

2. QUALIFIED REFUSAL⁷

BUFFINGTON v. CLARKE.

(Supreme Court of Rhode Island, 1887. 15 R. I. 437, 8 Atl. 247.)

PER CURIAM. The plaintiff sues the defendant in trover for the conversion of a watch. The action was tried in the court of common pleas, where a verdict was rendered for the plaintiff, and comes before us now on the defendant's petition for a new trial, on the ground that the verdict was against the evidence. The report of the testimony shows that the watch originally belonged to the plaintiff's father, who gave it to the plaintiff shortly before his death, and that the plaintiff allowed his father's widow to take and carry it, with the understanding that it should come back to him at her death. The watch remained in her possession until her death on September 13, 1884. She was a sister of the defendant, and died in his house, where she had been living for two or three years. There was some talk about the watch at the funeral, but no positive demand for it was made. Indeed, the plaintiff was not present at the funeral. A few days later the plaintiff sent a letter to the defendant demanding the watch. The defendant replied that his sister, the widow, had left a will which he had; that he would have it probated at the earliest moment; that the watch was safe; and that until somebody was appointed to take charge of his sister's effects he should not feel at liberty to pass the custody of it to anybody else. Thereupon the plaintiff began this suit; the writ therein being dated September 25, 1884. It does not appear that the defendant had any knowledge that the watch belonged to the plaintiff in the life-time of his sister, and he himself testified that his sister always treated and spoke of it as her own. Neither does it appear that the defendant, at the time of the demand, had any possession of the watch other than as he had possession of the other effects of his sister, by their being in his house, nor that he asserted any claim or right to it.

We do not think that the jury were warranted on this testimony in finding a conversion by the defendant. He did not absolutely refuse

⁷ For discussion of principles, see Chapin on Torts, § 82.

to deliver the watch to the plaintiff, but only declined to take it from among his sister's effects, and deliver it to him before the appointment of the executor. Proof of demand and refusal is only *prima facie* proof of conversion, and is always open to explanation. When the refusal is only for a time, for the purpose of ascertaining ownership, no conversion can be inferred, unless the refusal is unreasonably prolonged. The refusal must amount to a denial of the demandant's right in order to be a conversion. There does not appear to have been anything in the conduct of the defendant, or in the language used by him as reported, which could warrant the jury in finding a denial of the plaintiff's right, or anything more than a reasonable time to inquire into and ascertain his duty. *Singer Mfg. Co. v. King*, 14 R. I. 511; also in 24 Amer. Law Reg. (N. S.) 51, and note.

Petition granted.

3. QUANTUM OF PLAINTIFF'S INTEREST *

CITIZENS' BANK OF ST. LOUIS v. TIGER TAIL MILL & LAND CO.

(Supreme Court of Missouri, Division No. 2, 1890. 152 Mo. 145, 53 S. W. 902.)

This is an action of trover for 86 piles of cottonwood lumber, of the alleged value of \$5,000, of which plaintiff claims to have been the owner, and which it alleges was wrongfully converted by defendant to its own use. The petition alleges "that heretofore, to wit, on the 28th day of August, 1893, and ever since, plaintiff became, has been, and now is the owner of 86 piles of cottonwood lumber, known as and numbered 1 to 86, both numbers inclusive, situate in the yard of defendant at Tiger Tail, Tenn., and altogether containing 648,100 feet, which said personal property was and is of the value of, to wit, \$5,000; that afterwards, to wit, on the ——— day of May, 1894, said property came into the possession of the defendant, who then and there unlawfully converted the same to its own use, and disposed of same, to plaintiff's damage in the sum of \$5,000," etc.

BURGESS, J.⁹ The first question for consideration on this appeal is with respect to the sufficiency of the petition, which defendant contends fails to state a cause of action, in that it does not allege that plaintiff ever had possession of the lumber in question, or the right to its possession. The language of the petition is "that heretofore, to wit, on the 28th day of August, 1893, and ever since, plaintiff became, has been, and now is the owner; * * * that afterwards, to wit, on the ——— day of May, 1894, said property came into the posses-

* For discussion of principles, see Chapin on Torts, § 83.

⁹ The statement of facts is abridged and a portion of the opinion is omitted.

sion of the defendant, who then and there unlawfully converted the same to his own use, and disposed of the same, to plaintiff's damage," etc.; but it does not allege that plaintiff had the possession, or the right to the immediate possession, of the lumber at any time. In *Darlington on Personal Property* (page 36) the rule is announced that the action of trover "may be maintained only when the plaintiff has been in possession of the goods or has such a property in them as draws to it the right of possession." See, also, 26 Am. & Eng. Enc. Law, 744, note 5, and authorities cited. The action must be bottomed on the right of property in the plaintiff, who must have the right of possession as well as the right of property at the time. *Id.* While the use of formal and technical averments, which were necessary at common law to the statement of a cause of action, have been dispensed with by our Code, and are no longer necessary, the same material allegations are necessary under it that were necessary at common law; and it is clear, we think, that at common law, in order to state a cause of action in trover, the petition should state that the plaintiff had the possession, or the right to the possession, of the property sued for at the time of the conversion (*Bank v. Fisher*, 55 Mo. App. 51); and as no such averment, either expressly or by implication, is made in the petition in this case, it must be held to fail to state a cause of action. * * *

4. OFFER TO RETURN ¹⁰

CARPENTER v. MANHATTAN LIFE INS. CO.

(Supreme Court of New York, General Term, Second Department. 1880.
22 Hun, 47.)

BARNARD, P. J.¹¹ This is a hard action. The plaintiff was the owner of some hothouse plants which remained upon defendant's premises by its assent, and to accommodate the plaintiff. The plaintiff was notified to remove them, and he delayed doing so for a considerable time; but when he did endeavor to get them, the defendant refused to deliver them to the plaintiff. This was on Saturday, May 17, 1879. On Monday following, the defendant told the plaintiff he might have the plants. On Tuesday, May 20, 1879, this suit was commenced. The court charged the jury that the plaintiff was entitled to recover the difference between the market value of the property on Saturday and on Monday, when they were tendered back. We think in this charge the court erred. The conversion was made out by a refusal to deliver the property on Saturday. The plaintiff's right of action was then com-

¹⁰ For discussion of principles, see Chapin on Torts, § 84.

¹¹ The statement of facts is omitted.

plete, and could not be destroyed without his consent. If, after a conversion, the goods are received back, either before or after suit brought, it goes to mitigate the damages, and no further. A party whose goods are converted, cannot be forced to receive them back. *Livermore v. Northrup*, 44 N. Y. 107; *Reynolds v. Shuler*, 5 Cow. 323. The judgment should therefore be reversed and a new trial granted, costs to abide event.

DYKMAN, J.: I concur with reluctance. GILBERT, J., dissented.

Judgment and order denying new trial reversed and new trial granted; costs to abide event.

WASTE¹

PROFFITT v. HENDERSON.

(Supreme Court of Missouri, 1860. 29 Mo. 325.)

This was an action by two of the children of David Proffitt, deceased, against John H. Henderson. Plaintiffs allege in their petition that David Proffitt at his death was seised of a certain tract of two hundred acres; that by his last will he devised said land to his widow, Mary Proffitt for life and at her death to his children, John, Lucy, Elizabeth and Susan; that said Mary Proffitt the widow, conveyed her interest in said land to defendant Henderson for fifty dollars; that Lucy Proffitt conveyed her interest also to the defendant; and that this portion, one-fourth, has been allotted in partition to defendant; that on the remaining one hundred and fifty acres, defendant on, etc., and since, etc., committed waste and injury to said land, by cutting and carrying away timber, to the amount of six hundred dollars; that the value of said land was diminished by having said timber cut and carried away as aforesaid to the amount of six hundred dollars; that all the valuable rail timber on said land, and a large quantity of firewood were wrongfully and unlawfully cut and carried away from said land by the defendant; that by said waste and injury plaintiffs were damaged to the amount of four hundred dollars, which is two-thirds of the damages sustained to those who own the remaining interest in said land by the waste and injury aforesaid; that the value of the rail timber and firewood cut and carried away unlawfully and wrongfully by defendant is three hundred dollars; that plaintiffs are injured by losing the value of the timber thus cut and carried away to the amount of two hundred dollars, which is two-thirds of the damage sustained as aforesaid; that they are damaged by the diminution in value of said land by the acts and doings above stated to the amount of four hundred dollars and by losing the value of the timber as aforesaid to the amount of two hundred dollars; that the plaintiffs are each entitled to one-third of the tract of one hundred and fifty acres at the death of Mary Proffitt. Plaintiff prayed judgment for six hundred dollars and that defendant be enjoined from cutting timber. The court sustained a demurrer to this petition. This constitutes the error complained of.

EWING, Judge, delivered the opinion of the court.

Waste is defined to be the destruction of such things on the land by a tenant for life or years as are not included in its temporary profits. In other words, it consists in such acts as tend to the permanent loss

¹ For discussion of principles, see Chapin on Torts, § 86.

of the owner in fee or to destroy or lessen the value of the inheritance. 1 Hill. on Real Prop. 261. The American doctrine on the subject of waste, observes Chancellor Kent, is somewhat varied from the English law, and is more enlarged and better accommodated to the circumstances of a new and growing country. In England the destruction of timber carries with it the idea of a permanent injury to the estate, as timber is scarce and forest trees are planted for useful as well as ornamental purposes, and are too valuable to permit the timber to be unnecessarily destroyed. It is not waste in this country to convert arable land into meadow, nor vice versa; nor is it waste to clear land by a tenant for life. But there is a due and reasonable medium to be observed according to the custom of farmers. To cut down all the timber on a tract of land and sell it would be waste, because it would be detrimental to the inheritance. *McCullough v. Irvine's Ex'rs*, 13 Pa. 338. But cutting timber and clearing land may, so far from being waste, often enhance the value of the inheritance; and it is only when there is lasting damage to the reversionary interest, or its value has been lessened, that the tenant in such case is liable for waste.

In *Davis v. Gilliam*, 40 N. C. 311, the doctrine is stated by Chief Justice Ruffin thus: That, as the state of the country now is a tenant for life of land entirely wild, might clear as much of it for cultivation as a prudent owner of the fee would; and might sell the timber that grew on that part of the land. Clearing for cultivation, he says, has, according to the decisions, peculiar claims for protection and a sale of the timber from the field cleared may be justly made in compensation for clearing and bringing it into cultivation. But it seems altogether unjust that a particular tenant should take off the timber without any adequate compensation to the estate for the loss of it; for he takes in that case not the product of the estate arising in his own time, but he takes that which nature has been elaborating through ages, being a part of the inheritance itself, and that too which imparts to it its chief value.

The rule of pleading in such actions as this is that, if the plaintiff declare as reversioner for an injury done to his reversion, the declaration must allege it to have been done to the damage of his reversion, or must state an injury of such a permanent nature as to be necessarily injurious to his reversion. *Jackson v. Peshed*, 1 M. & S. 221; *Potts v. Clarke*, 20 N. J. Law, 542. Are the acts complained of as wrongful of such a nature as necessarily to result in an injury to the reversionary interest? The petition charges that defendant cut down and carried away all the valuable rail timber, and that the value of the timber so carried away is three hundred dollars, and that the land in consequence thereof is diminished in value to the amount of six hundred dollars.

It is objected that the petition fails to show that the cutting of the timber was not necessary to the profitable enjoyment of the land, or that it was not done for the purpose of cultivation, and that it is not

alleged that the land is valuable for any purpose except the timber. As it respects the first of these objections to the petition, it is conceived that the profitable enjoyment of the land is not the proper criterion to determine the question of waste. There may be waste when there is such profitable enjoyment and there may be profitable enjoyment without waste. The cutting of the timber may have been necessary to the profitable enjoyment of the land according to the tenant's standard of profit, and yet have been a great outrage upon the rights of the reversioner. It may have been more profitable to the tenant to have cut down and taken away the valuable timber, as the petition alleges, than to have used it in clearing the land or some portion of it. As to the next objection, that the petition is defective in not alleging that the timber was not cut for the purpose of cultivation, we think it clearly appears, though not so expressly stated, that it was not for this purpose. The defendant had purchased the interest of one of the owners in fee, being one-fourth of the tract of two hundred acres, which, under an order of partition had been set off to him, and thus merged his life estate as to that part of the fee, and upon the remaining portion of said tract one hundred and fifty acres, the waste is alleged to have been committed. And the averment that all the valuable rail timber was cut down and carried away clearly enough negatives the idea of its having been used in clearing the land or for any other purpose on the premises. The other objection, that there is no allegation that the land was not valuable for any other purpose except timber, is not well taken; for, if the land is valuable for the timber only, it would surely be waste for a tenant to cut and carry away all the timber of any value. If useful for the timber alone, the tenant must in that case, as in all others, respect the rights of the owner of the inheritance and his enjoyment of it must be regulated accordingly. The other Judges concurring, the judgment will be reversed and the cause remanded.

FRAUD

I. Statement¹

1. PROMISE

LONG v. WOODMAN.

(Supreme Judicial Court of Maine, 1870. 58 Me. 49.)

APPLETON, C. J.² This is an action on the case for deceit. The defendant has filed a special demurrer to the declaration, which has been joined. The only inquiry arising is whether it sets forth any cause of action.

When stripped of all inculpatory phraseology, the declaration alleges the following facts: That on the 6th day of March, 1868, the defendant, and one George W. Reed, induced the plaintiff to convey to them certain real estate, described in the writ, by lending to him (the plaintiff) two hundred and thirty-six dollars, and by promising to give him a bond to reconvey the property in two years, upon the payment of said sum and interest; that after obtaining said deed they (the defendant and said Reed) refused to give said bond; that on the 5th day of March, 1870, the plaintiff tendered to the defendant the sum of three hundred and fifty dollars, being said sum of two hundred and thirty-six dollars and interest thereon, and all other charges and expenses to which defendant had been put, on account of said property, including taxes and all other sums due from the plaintiff to the defendant; and that he demanded a reconveyance of said property, which defendant then and there refused to make.

To entitle a party to maintain an action for deceit by means of false representations, he must, among other things, show that the defendant made false and fraudulent assertions, in regard to some fact or facts material to the transaction in which he was defrauded, by means of which he was induced to enter into it. The misrepresentation must relate to alleged facts or to the condition of things as then existent. It is not every misrepresentation, relating to the subject-matter of the contract, which will render it void or enable the aggrieved party to maintain his action for deceit. It must be as to matters of fact, substantially affecting his interests, not as to matters of opinion, judgment, probability, or expectation. *Hazard v. Irwin*, 18 Pick. (Mass.) 95. An assertion respecting them is not an assertion as to any existent fact. The opinion may be erroneous; the judgment may be unsound;

¹ For discussion of principles, see Chapin on Torts, §§ 87, 88.

² The statement of facts is omitted.

the expected contingency may never happen; the expectation may fail. An action of tort, for deceit in the sale of property, does not lie for false and fraudulent representations concerning profits that may be made from it in the future. *Pedrick v. Porter*, 5 Allen (Mass.) 324. An action for deceit in the sale of real estate cannot be sustained by proof of fraudulent misrepresentations as to the price paid by the vendor. *Hemmer v. Cooper*, 8 Allen, 334.

So in criminal law, to sustain an indictment for cheating by false pretences, there must be direct and positive assertion as to some existing matter of fact, by which the victim is induced to part with his money or property. A false representation, promissory in its nature, as to pay money or do some other act, has never been held to be the foundation of a criminal charge. *Ranney v. People*, 22 N. Y. 413. In an indictment for obtaining goods under false pretences, no statement of anything to take place in the future will constitute a pretence within the meaning of the statute. *Glackan v. Com.*, 3 Metc. (Ky.) 232. A representation or assurance in relation to a future event is not a statutory false pretence. *State v. Magee*, 11 Ind. 154.

Here the defendant, when or after he obtained his deed, promised "to make, execute, and deliver a good and sufficient bond," to reconvey, upon certain conditions, the land conveyed to him and Reed, which upon request he refused to do. Here is no false representation or concealment of an existent fact. Yet this is the gist of the plaintiff's complaint, that a promise made has not been performed. Had it been performed, the plaintiff had no case.

Here is a promise to do some future act; but whether it be to pay money or give a bond is immaterial. If the promise had been to pay a sum of money instead of giving a bond, no action for deceit could have been maintained, though the money was not paid at the stipulated time. This case in no respect differs from a broken promise to pay for goods sold. The goods are delivered upon the expectation that the promise to pay will be performed. The deed was given upon the expectation that the bond would be delivered in accordance with the promise of the grantee.

The declaration sets forth a promise to deliver a certain bond as therein described. It does not state whether it is in writing or not. There is no special plea denying it to be in writing. *Lawrence v. Chase*, 54 Me. 196. If the promise was in writing, it was for a sufficient consideration, and the plaintiff may maintain an action thereon. If not in writing it would be void by the statute of frauds. *Lawrence v. Chase*, 54 Me. 196. But a verbal promise within the statute is no false representation. It is a promise, for the violation of which the law fails to provide a remedy, in case of its nonperformance. In *Fisher v. New York C. P.*, 18 Wend. (N. Y.) 608, the facts were somewhat similar to those in the case at bar. The plaintiff below leased certain premises to the defendant, and promised to make repairs thereon, which he refused

to do. Mr. Justice Cowan, in delivering the opinion of the court, uses the following language: "Fraud cannot be predicated of a promise not performed, for the purpose of avoiding a written instrument, or a bargain of any kind. This case is no more. A contrary doctrine would avoid almost every contract for a breach of which a suit is to be brought. I have only to say that the tenant and defendant below were content to take the plaintiff's word. If that was not legally obligatory, then there has been a mistake of the law; but the defendant could not set that up as fraud." The case of *Com. v. Brenneman*, 1 Rawle (Pa.) 314, resembles the present. In delivering the opinion of the court, Rogers, J., says: "There is no doubt that in the breach of promise, Henry Brenneman; in a moral point of view, was guilty of fraud; but it was no more fraudulent than any other breach of trust or promise. There was no false representation or concealment of any existing fact, which constitutes the legal idea of fraud."

Exceptions overruled.

KENT, WALTON, BARROWS, DANFORTH, and TOPLEY, JJ., concurred.

2. OPINION

DEMING v. DARLING.

(Supreme Judicial Court of Massachusetts, 1889. 148 Mass. 504, 20 N. E. 107, 2 L. R. A. 743.)

HOLMES, J.^a This is an action for fraudulent representations alleged to have been made to one Dr. Jordan, the plaintiff's agent for the purpose of inducing the plaintiff to purchase a railroad bond from the defendant. * * *

Among the representations relied on, one was that the railroad mortgaged, which was situated in Ohio, was good security for the bonds; and another was that the bond was of the very best and safest, and was an A No. 1 bond. With regard to these and the like, the defendant asked the court to instruct the jury "that no representations which the defendant might have made or did make to Dr. Jordan in relation to the value of the bond in question, or of the railroad, its terminals, and other property which were mortgaged to secure it, with other bonds, even though false, were representations upon which Dr. Jordan ought to have relied, and are not sufficient to furnish any grounds for this action," and also "that each of the expressions 'and that the same' (meaning said railroad and all the property covered by the mortgage) 'was good security for said bonds,' 'that said bond was of the very best and safest, and was an A No. 1 bond,' are expressions of

^a Portions of the opinion have been omitted.

opinion of value, and even though false, are not such representations as Dr. Jordan had a right to rely upon, and are not enough to furnish any grounds for this action."

The court declined to give these instructions, and instead instructed the jury that "an expression of opinion, judgment, or estimate, or a statement of a promissory nature relating to what would be in the future, so far as they were expressions of opinion, if made in good faith, however strong as expressions of belief, would not support an action of deceit."

It will be seen that the fundamental difference between the instructions given and those asked is that the former require good faith. The language of some cases certainly seems to suggest that bad faith might make a seller liable for what are known as seller's statements, apart from any other conduct by which the buyer is fraudulently induced to forbear inquiries. *Pike v. Fay*, 101 Mass. 134. But this is a mistake. It is settled that the law does not exact good faith from a seller in those vague commendations of his wares which manifestly are open to difference of opinion, which do not imply untrue assertions concerning matters of direct observation (*Teague v. Irwin*, 127 Mass. 217), and as to which it always has been "understood, the world over, that such statements are to be distrusted." *Brown v. Castles*, 11 Cush. 348, 350; *Gordon v. Parmelee*, 2 Allen, 212; *Parker v. Moulton*, 114 Mass. 99, 19 Am. Rep. 315; *Poland v. Brownell*, 131 Mass. 138, 142, 41 Am. Rep. 215; *Burns v. Lane*, 138 Mass. 350, 356. *Parker v. Moulton* also shows that the rule is not changed by the mere fact that the property is at a distance, and is not seen by the buyer. Moreover, in this case, market prices at least were easily accessible to the plaintiff.

The defendant was known by the plaintiff's agent to stand in the position of a seller. If he went no further than to say that the bond was an A No. 1 bond, which we understand to mean simply that it was a first rate bond, or that the railroad was good security for the bonds, we are constrained to hold that he is not liable under the circumstances of this case, even if he made the statement in bad faith. See, further, *Veasey v. Doton*, 3 Allen, 380; *Belcher v. Costello*, 122 Mass. 189. The rule of law is hardly to be regretted, when it is considered how easily and insensibly words of hope or expectation are converted by an interested memory into statements of quality and value when the expectation has been disappointed. * * *

Exceptions sustained.

3. CONCEALMENT *

KIDNEY v. STODDARD.

(Supreme Judicial Court of Massachusetts, 1843. 7 Metc. 252.)

Trespass upon the case for an alleged fraudulent representation by the defendant as to the credit of his son, Alden D. Stoddard, Jr., in the following letter to F. Delano, of New York: "Fairhaven, 9 mo. 27th, 1841. Franklin Delano, Esq.—My Dear Sir: The bearer, my son, A. D. Stoddard, Jr., wishes to purchase a bill of goods in your city. Any assistance you can render him, by a recommendation or otherwise, will be gratefully received by him and much oblige your obedient servant who will take the liberty to say that A. D. S., Jr.'s, contracts, of whatever nature, will unquestionably be punctually attended to. Very respectfully, your friend, A. D. Stoddard."

At the trial before Wilde, J., one Ammidon testified that he was agent of the plaintiffs; that Stoddard, Jr., called on him in New York, about the 1st of October, 1841, to purchase some goods and referred him to Delano; that the witness called on Delano, who showed said letter to him and stated that he was not acquainted with the young man, but knew his father and believed him to be a responsible man; that from the knowledge he had of him he should believe he would see his son through, and that on the strength of the letter he should sell the young man goods to the amount of four or five hundred dollars; that the witness at that time sold to the son goods to the amount of \$260 and afterwards to the amount of \$158.50; that the son afterwards applied for more goods, but the witness refused to sell him. The witness testified that he would not have sold him the goods, had it not been for the said letter and the representations of Delano; that no part of the debt had ever been paid; that he had never attempted to recover the amount of the young man; that he had called on the defendant to effect a settlement, and told him that he (the witness) had understood since the sales that his son was a minor at the time the letter was written; that the defendant admitted that such was the fact, refused to pay the debt, and stated that his son had gone to sea on a whaling voyage.

There was other evidence to show that the son was a minor when the letter was written, being between twenty and twenty-one years of age, and that he had then been in business, as a dealer in hats, a year or more.

The judge instructed the jury that when a party intentionally con-

* For discussion of principles, see Chapin on Torts, §§ 87, 88.

ceals a material fact in giving a letter of recommendation it amounts to a false representation; that the defendant, giving a letter in this case to an unlimited amount, was bound to communicate every material fact; that if he concealed the fact that the son was a minor with the view to give him a credit, knowing or believing that he would not get a credit if that fact was known, it was fraud, and the plaintiff was entitled to recover; that it was immaterial whether there was any moral fraud; and that every man was presumed to know the consequences of his own acts.

The defendant's counsel requested the judge to instruct the jury that, if the defendant gave his opinion merely, he was not bound to communicate any facts, and that, if he gave an honest opinion, he was not liable. But the judge refused so to instruct the jury. It was also contended by the defendant's counsel that the plaintiffs should have made an effort to recover the debt of the son.

The jury found a verdict for the plaintiffs for the amount of the goods sold, and the defendant moved for a new trial on the ground that the jury were misdirected in matter of law.

HUBBARD, J. This cause has been argued with ability and feeling by the counsel for the defendant, who, it had been urged, was a father, and whose letter was written with strong expressions of parental confidence and affection, and at the same time without false allegations in it. But, while sympathy for a client is highly praiseworthy on the part of counsel, the court are required not to yield to sympathies, or to give way to compassion, but to administer the law in its integrity, although it may seem to bear hardly in particular instances. To bend the rules of law, to avoid the pressure in individual cases, would produce uncertainty in the law itself, and in the end be subversive of justice.

It is argued that the jury were compelled to find for the plaintiffs, on the mere concealment of a single fact by the defendant; or, in other words, that the charge of the presiding judge was erroneous. But the jury was not directed to return a verdict for the plaintiffs, unless they found, as a fact, that the defendant concealed that his son was a minor, with a view to give him a credit and knowing or believing that he would not obtain a credit if that fact were known.

It is very certain, as has been maintained by the defendant's counsel, that a mistaken opinion honestly given can never be taken as a fraudulent representation. This is true in principle and supported abundantly by authorities. But the misfortune of the defendant's case is that the verdict of the jury rests not on the honest mistake of the defendant, but upon the ground of material concealment of a fact especially within his knowledge; a fact important to be known as it regarded the credit of the son; a fact designedly concealed and with the view of obtaining that credit for the son, which he, the father, knew or believed he could not obtain if that fact were known.

It needs no lengthened argument to establish the materiality of the fact. The result of this case is a sufficient witness of it. The plaintiffs were induced by the letter, from which this fact was carefully excluded, to give a credit to the son which they would not otherwise have given; and, as the direct consequence of it, they have sustained the loss set out in the declaration. Here then are proved fraud and deceit on the part of defendant, and damage to the plaintiffs; and these facts have long been held to constitute a substantial cause of action. From the time of the judgment in the great case of *Pasley v. Freeman*, 3 T. R. 51, to the present day, through the long line of decisions both in England and America, the principle of that case, though with some statute modifications, remains unshaken and unimpaired.

The case at bar has been likened to that of *Tyron v. Whitmarsh*, 1 Metc. 1, 35 Am. Dec. 339, and the letters in the two cases have much similarity. But in that case, in which the authorities were carefully examined by the court, it was decided that the letter might have been written with an honest conviction of the truth of the assertions contained in it. But in the case at bar there was the designed concealment of a fact with intent to procure a credit which could not be obtained if the fact were made known; and this the defendant well knew or believed. We think that the principles laid down in that case, though the verdict was set aside, are decisive of the present case. The court there say: "We are therefore of opinion that the question for the jury was whether the defendant knew that the assertion or opinion contained in his letter was false, or that he did not fully believe it to be true, or whether he did not conceal a material fact from the knowledge of the plaintiffs with the intention to deceive them. It is true, as the defendant's counsel have argued, that the defendant was not bound to disclose the facts on which his opinion was founded; but, if he kept back any material fact with the intent to deceive the plaintiffs, this would be fraudulent." So in *Lobdell v. Baker*, 1 Metc. 201, 35 Am. Dec. 358, a case, though very different in its facts, yet having features of resemblance to this, the court say: "There was no evidence that the defendant made any express declaration that the note sold was a valid note, and that the makers and indorsers were liable; but we are all of opinion that if he fraudulently procured the indorsement of Swan, and then authorized Winslow to sell the note, without erasing the name of Swan, *knowing as he did that Swan was a minor, and not by law liable on the note*, all this would be equivalent to an express affirmation that the note was a valid contract, on which the makers of the note and the indorsers were by law liable."

It was also argued, in arrest of judgment, that the plaintiffs could not recover, because they had made no attempt to procure the debt from the son; but it being apparent that the declaration set forth a good cause of action, the defendant's counsel, waiving the motion in arrest, argued that the plaintiffs had not made out a case for dam-

ages, because they had not prosecuted the claim against the son to final judgment; as infancy is only a personal privilege, and there is no certainty he would take advantage of it, and the court cannot presume that he will not pay an honest debt. But the son did not pay the demand when due. The plaintiffs therefore sustained the loss of which they complain, by reason of the false representation; and the injury being complete, the cause of action accrued without prosecuting a suit against the son. And, supposing the question turned on the point whether the plaintiff had used due diligence to collect the demand of the son, then it might well be replied that when the plaintiffs came to the knowledge of the fact that the son was a minor, and applied to the father for a settlement, he refused to pay the debt, and informed them that his son had gone to sea on a whaling voyage. If, therefore, the plaintiffs had been bound to pursue the son in the first instance—as we think they were not—still this state of facts would have justified them in not prosecuting the son before looking to the father for redress; nor does it call on them to await his return, *ad vana seu impossibilia non cogit lex*. The jury then having established the fraud and deceit on the part of the defendant, and the damage to the plaintiffs, the motion to set aside the verdict is overruled.

Judgment on the verdict.

II. Intent to Cause Action ⁵

HENRY v. DENNIS.

(Supreme Judicial Court of Maine, 1901. 95 Me. 24, 49 Atl. 53, 85 Am. St. Rep. 365.)

WISWELL, C. J.⁶ For some time prior to May 1, 1896, Henry, the plaintiff in one of these suits, had been engaged in the wool business alone, under the name of W. S. Henry, Jr., & Co. On that day he formed a copartnership in the same business with one Charles C. Parsons, and the business was subsequently carried on in the firm name of Henry & Parsons. But after the formation of the firm Mr. Henry continued his individual business, in the name of W. S. Henry, Jr., & Co., to the extent of selling from time to time a quantity of wool which he had on hand at the time of the formation of the copartnership.

On August 15, 1896, after the formation of the firm of Henry & Parsons, but while Mr. Henry was still selling on his own account the wool which he previously had on hand and which had not been

⁵ For discussion of principles, see Chapin on Torts, § 88(2).

⁶ The statement of facts except as contained in the opinion is omitted.

turned over to the firm, Henry wrote a letter to the Gardiner Woolen Company, in which he referred to an order for wool just received and in which he says: "At Mr. W. D. Eaton's request we sent you the little lot without any knowledge of your financial standing, but if we are to continue to ship you wool on 60 days' time, we feel justified in informing ourselves in that respect and we presume that you would prefer to have us inquire directly of you than of outside parties. * * * Will you kindly favor us with full particulars which we trust will warrant a continuation of our business relations to our mutual benefits." This letter was dictated by Mr. Henry, as shown by the letter, but was signed in the name of W. S. Henry, Jr., & Co.

In reply to this letter of inquiry, the defendant, to whom the letter was turned over for reply, under date of August 24, 1896, wrote a letter directed to W. S. Henry & Co., which, it is claimed, contained false and material representations as to the financial standing and condition of the Gardiner Woolen Company, which were subsequently acted upon by Mr. Henry, both individually and as a member of the firm of Henry & Parsons, by making sales to the Woolen Company on credit, upon his own account and upon that of the firm. The plaintiffs, Henry in one case and Henry & Parsons in the other, being unable to collect of the Woolen Company the amounts due them, because of its insolvency, brought these two actions to recover for the injuries sustained by them by reason of the alleged misrepresentations of the defendant.

The two cases were tried together, and the jury found against the defendant in both cases. The only question now presented by the exceptions is whether or not the representations contained in the defendant's letter directed to W. S. Henry & Co. could have been so acted upon and relied upon by Mr. Henry as a member of the firm of Henry & Parsons that the defendant would be liable to that firm for any injury sustained by it on account thereof, as well as to Henry individually for any injury sustained by him for the same reason.

It is urged in behalf of the defendant that he should not be and is not liable to the firm of Henry & Parsons for any misrepresentations contained in that letter, because the letter was not directed to the firm and because there was no privity between it and the defendant. The case shows that the defendant did not know of the existence of Mr. Parsons or of the firm of Henry & Parsons. But Henry was the active member of the firm, and one who made these sales upon credit to the Woolen Company, and the jury must have found that Henry was induced to make these sales upon credit, both for himself and for the firm, by the representations contained in the defendant's letter, and that in making the sales and in extending credit to the company, both individually and as a member of the firm, he relied upon these representations.

No authority exactly in point has been called to our attention, but the

general principles relative to the liability of a person for injuries caused by such misrepresentations, are well settled. One who makes a misrepresentation must, to render himself liable, have made it with the intention that it should be acted upon by the person to whom it is made or by one to whom he intended it should be communicated, and he is therefore responsible to such persons only as it was intended for.

It is a general rule that a person cannot complain of false representations, for the purpose of maintaining an action of deceit, unless the representations were either made directly to him, with the intention that they should be acted upon by him, or made to another person with the intention that they should be communicated to him and acted upon by him. A representation made to one person with the intention that it shall reach the ears of another and be acted upon by him, and which does reach him, and is acted upon by him to his injury, gives the person so acting upon it the same right to relief or redress as if it had been made to him directly. *Am. & Eng. Encyc. of Law* (2d Ed.) vol. 14, pp. 148 and 149, and cases there cited. See, also, *Hunnewell v. Duxbury*, 154 Mass. 286, 28 N. E. 267, 13 L. R. A. 733; *Nash v. Minn. Title Ins. & Trust Co.*, 159 Mass. 437, 34 N. E. 625.

Applying these general principles to the particular question here involved, we think that the defendant is liable to the firm for such injury as it suffered in consequence of the misrepresentations contained in his letter, whereby the firm was induced to make sales of its goods to the Woolen Company upon credit. The answer of the defendant to the letter of inquiry was directed to a firm; its object was to obtain credit for the Woolen Company from a firm of which Henry was a member. True, the defendant did not know that Parsons was associated in business with Henry, nor did he know, so far as the case shows, that Henry was also doing business alone under a firm name. But he must have contemplated that the contents of this letter would either be communicated to other members of any firm of which Henry was a partner, in that business, and be acted upon by the firm, or that Henry, acting for a firm, would be induced by his letter to give credit to the Woolen Company. The letter was not only intended for Henry, but as well for those associated with him in that business.

It is of no consequence that the letter was directed to W. S. Henry & Co., when it was in fact relied upon by Henry as a member of the firm of Henry & Parsons. It is not necessary, in order for a defendant to be liable for the consequences of his misrepresentations, that he should know the names of the persons to whom the misrepresentations may be communicated, provided he contemplated that they should be communicated to others and be acted upon by them.

Here, as the case shows, Henry, to whom the misrepresentation was directly made, was induced thereby, as a member of the firm of Henry

& Parsons, to sell the firm's goods on credit, and thereby the firm suffered. This is precisely what was within the intention of the defendant; he is consequently liable therefor. This result is in accordance with the ruling of the court at the trial.

Exceptions overruled.

III. Action by Complainant⁷

FOTTLER v. MOSELEY.

(Supreme Judicial Court of Massachusetts, 1901. 179 Mass. 295, 60 N. E. 788.)

Tort for deceit, alleging that, relying upon false and fraudulent representations of the defendant, a broker, that certain sales of stock of the Franklin Park Land Improvement Company in the Boston Stock Exchange from January 1 to March 27, 1893, were genuine transactions, the plaintiff revoked an order for the sale of certain shares of that stock held for him by the defendant, whereby the plaintiff suffered loss. Writ dated February 17, 1896.

At the trial in the Superior Court, Hopkins, J., at the close of the evidence, directed the jury to return a verdict for the defendant. The verdict was returned as directed; and the plaintiff alleged exceptions. The findings warranted by the evidence are stated in the opinion of this court.

Besides the facts stated in the opinion, the following facts appeared in evidence: During the time in question, and for some time before, the plaintiff had been in the habit of buying and selling stocks through the defendant as a broker; and in January, 1891, the defendant, at the request of the plaintiff, agreed to carry for him, on margin, three hundred shares of Franklin Park Land & Improvement Company stock, which the plaintiff bought of one Moody Merrill. It appeared that Merrill had been an acquaintance of the plaintiff since 1880 or 1881; that the plaintiff and Merrill were codirectors of the Franklin Park Land & Improvement Company from June, 1891, till June, 1893, and were also codirectors in another corporation; that Merrill was president of the Highland Street Railway Company, was a man well known in Boston and of good reputation until he absconded in June, 1893, when the Franklin Park stock became of little or no value; that after 1892 Merrill and the plaintiff bought and sold stocks on joint account through the defendant.

HAMMOND, J. The parties to this action testified in flat contradiction of each other on many of the material issues, but the evidence in behalf of the plaintiff would warrant a finding by the jury that on

⁷ For discussion of principles, see Chapin on Torts, § 88 (3).

March 25, 1893, the plaintiff, being then the owner of certain shares of stock in the Franklin Park Land Improvement Company, gave an order to the defendant, a broker, who was carrying the stock for him on a margin, to sell it at a price not less than \$28.50 per share; that on March 27th the defendant, for the purpose of inducing the plaintiff to withdraw the order and refrain from selling, represented to the plaintiff that the sales which had been made of said stock in the market had all been made in good faith and had been "actual true sales throughout" that these statements were made as of personal knowledge of the defendant, and that the plaintiff believing them to be true and relying upon them was thereby induced to and did cancel his oral order to the defendants to sell and did refrain from selling, and that the statements were not true as to some of the sales in the open market of which the last was in December, 1892, and that the defendant knew it at the time he made the representations. The evidence would warrant a further finding that in continuous reliance upon such representations the plaintiff kept his stock when he otherwise would have sold it until the following July, when its market value depreciated, and he thereby suffered loss. The defendant, protesting that he made no such representation and that the jury would not be justified in finding that he had, says that even upon such a finding the plaintiff would have no case. He contends that the representation was not material, that a false representation, to be material, must not only induce action, but must be adequate to induce it by offering a motive sufficient to influence the conduct of a man of average intelligence and prudence, and that in this case the representation complained of, so far as it was false, was not adequate to induce action, because the fictitious sales were so few and distant in time, and that therefore it was not material.

It may be assumed that the plaintiff desired to handle his stock in the manner most advantageous to himself, and that the question whether he would withdraw his order to sell was dependent, somewhat at least, upon his view of the present or future market value of the stock; and upon that question a man of ordinary intelligence or prudence would consider whether the reported sales in the market were "true sales throughout," or were fictitious and what was the extent of each. It is true that a corporation may be of so long standing and of such a nature and the number of the shares so great and the daily sales of the stock in the open market so many and heavy that the knowledge that a certain percentage of the sales reported are not actual business transactions would have no effect upon the conduct of an ordinary man. On the other hand, a corporation may be so small and of such a nature and have so slight a hold upon the public and the number of its shares may be so small and the buyers so few that the question whether certain reported sales are fictitious may have a very important bearing upon the action of such a man. Upon the evidence in this case we cannot say, as matter of law, that the representation so far as false was not material. This question is for the jury, who are

to consider it in the light of the nature of the corporation and its standing in the market, and the other matters including such as those of which we have spoken.

It is further urged by the defendant that one of the fundamental principles in a suit like this is that the representation should have been acted upon by the complaining party and to his injury; that at most the plaintiff simply refrained from action, and that "refraining from action is not acting upon representation" within the meaning of the rule; and, further, that it is not shown that the damages, if any, suffered by the plaintiff are the direct result of the deceit.

Fraud is sometimes defined as the "deception practiced in order to induce another to part with property or to surrender some legal right," Cooley, Torts (2d Ed.) 555, and sometimes as the deception which leads "a man into damage by willfully or recklessly causing him to believe and act on a falsehood," Pollock Torts (Webb's Ed.) 348, 349. The second definition seems to be more comprehensive than the first (see for instance *Barley v. Walford*, 9 Q. B. 197, and *Butler v. Watkins*, 13 Wall. 456, 20 L. Ed. 629), and while the authorities establishing what is a cause of action for deceit are to a large extent convertible with those which define the right to rescind a contract for fraud or misrepresentation and the two classes of cases are generally cited without any express discrimination, still discrimination is sometimes needful in the comparison of the two classes of cases. Pollock, Torts (Webb's Ed.) 352.

It is true that it must appear that fraud should have been acted upon. It is a little difficult to see precisely what is meant by the contention that "refraining from action is not acting upon representation." If by refraining from action it is meant simply that the person defrauded makes no change, but goes on as he has been going and would go whether the fraud had been committed or not, then the proposition is doubtless true. Such a person has been in no way influenced, nor has his conduct been in any way changed, by the fraud. He has not acted in reliance upon it. If, however, it is meant to include the case where the person defrauded does not do what he intended and started to do and would have done save for the fraud practiced upon him, the proposition cannot be true. So far as respects the owner of property, his change of conduct between keeping the property on the one hand and selling it on the other is equally great whether the first intended action be to keep or to sell; and if by reason of fraud practiced upon him the plaintiff was induced to recall his order to sell and being continuously under the influence of this fraud, kept his stock when, save for such fraud, he would have sold it, then with reference to this property he has acted upon the representation within the meaning of the rule as applicable to cases like this. *Barley v. Walford*, 9 Q. B. 197; *Butler v. Watkins*, 13 Wall. 456, 20 L. Ed. 629.

The cases of *Lamb v. Stone*, 11 Pick. 527, *Wellington v. Small*, 3 Cush. 145, 50 Am. Dec. 719, and *Bradley v. Fuller*, 118 Mass. 239,

upon which the defendant relies, are not authorities for the proposition "that refraining from action is not acting upon representation."

As to whether the loss suffered by the plaintiff is legally attributable to the fraud, much can be said in favor of the defendant, and a verdict in his favor on this as well as on other material points might be the one most reasonably to be expected upon the evidence, especially when it is considered that during the years 1892 and 1893 the plaintiff was a director in the company; but we cannot decide the question as a matter of law. If the fraud operated on the plaintiff's mind continuously up to the time of the depreciation of the stock in June, 1893, so that he kept his stock when otherwise he would have sold it and such was the direct, natural and intended result, then we think the causal relation between the fraud and the loss is sufficiently made out. See *Reeve v. Dennett*, 145 Mass. 23, 29, 11 N. E. 938.

Exceptions sustained.

1. DUTY TO INVESTIGATE⁸

JACOBSEN v. WHITELEY.

(Supreme Court of Wisconsin, 1909. 138 Wis. 434, 120 N. W. 285.)

Action for damages from deceit. The plaintiff claimed that he was induced to buy capital stock at par to the amount of \$3,000 in the Topliff Dry Goods Company, a corporation of this state, by fraudulent representations of the defendants to the effect that said company was doing a prosperous business, that its business was in a flourishing condition, that for the year 1904 it made a net profit in its business of over \$4,000 and that the amount of its indebtedness was about \$19,000 and its assets about \$50,000, all with intent to induce plaintiff to buy said stock. Evidence was introduced of the making of said representations, of the material falsity thereof, of the extent of opportunity and ability of the plaintiff to ascertain such falsity before the purchase of said stock, and also a large amount of testimony of his opportunity to learn the same after he had purchased it and before commencing suit, during a part of which period he continued in the employ of said corporation at \$25 per week, and was also a director and stockholder therein. The making of fraudulent representations was also put in issue both by the pleadings and the evidence. At the close of the trial the court entered judgment of nonsuit, from which the plaintiff appeals.

DODGE, J. As this case went off on nonsuit at the close of the plaintiff's evidence, it was only necessary to inquire whether there was any credible evidence which, taken with all intendments and rea-

⁸ For discussion of principles, see Chapin on Torts, § 88.

sonable inferences most favorably to the plaintiff, tended to establish the cause of action. It is undeniable that there was evidence that the defendants represented to the plaintiff that the corporation had assets of about \$50,000; that its debts were only about \$19,000; that it was doing a prosperous business and earned a substantial profit the preceding year; also that each of those statements was false; that plaintiff relied upon them; and that the stock purchased was of less value than if the facts stated had been true. Materiality of such representations to the making of the contract cannot well be doubted. We presume, however, the court's reason for entering the nonsuit was, as counsel for respondents argues, that plaintiff had full opportunity for knowing the falsity of the representations made to him before he purchased, and therefore could not and did not rely upon their truth.

The rule of law is well established that a purchaser is not justified in relying upon the statements of the seller when their falsity is obvious to him, but this does not require that he shall meet every positive statement with incredulity and must search to ascertain whether it is false. The law recognizes the duty of each to refrain from even attempted deceit of another with whom he deals, and the right of the latter to assume that he will do so. It is an unsavory defense for a man who by false statements induces another to act to assert that if the latter had disbelieved him he would not have been injured. *McClellan v. Scott*, 24 Wis. 81, 86; *Tyner v. Cotter*, 67 Wis. 482, 491, 30 N. W. 782. Nevertheless courts will refuse to act for the relief of one claiming to have been misled by another's statements who blindly acts in disregard of knowledge of their falsity, or with such opportunity that by the exercise of ordinary observation, not necessarily by search, he would have known. He may not close his eyes to what is obviously discoverable by him. *Northern S. Co. v. Wangard*, 117 Wis. 624, 94 N. W. 785, 98 Am. St. Rep. 963; *Kaiser v. Nummendor*, 120 Wis. 234, 97 N. W. 932, and cases there cited; *Miller v. Hackbarth*, 126 Wis. 50, 52, 105 N. W. 311. It is in this sense only that opportunity to know the truth will prevent recovery for deceit. Whether the situation presents or fails to present such opportunity is usually a question of fact. The intelligence or acuteness of plaintiff is one important element. *Barndt v. Frederick*, 78 Wis. 1, 11, 47 N. W. 6, 11 L. R. A. 199; *Bowe v. Gage*, 127 Wis. 245, 246, 106 N. W. 1074, 115 Am. St. Rep. 1010. Another is the reliance reposed by the buyer on the seller by reason of acquaintance or confidence. These and many other considerations have proper effect in deciding whether the truth was obvious, as appears in the various cases already cited and very many others. *Lockwood v. Allen*, 113 Wis. 474, 89 N. W. 492; *Bostwick v. Mut. L. Ins. Co.*, 116 Wis. 392, 89 N. W. 538, 92 N. W. 246, 67 L. R. A. 705; *Mannel v. Shafer*, 135 Wis. 241, 115

N. W. 801; *King v. Graef*, 136 Wis. 548, 117 N. W. 1058, 20 L. R. A. (N. S.) 86, 128 Am. St. Rep. 1101.

In the light of these principles, let us examine the evidence, at least in its tendency. The opportunities claimed to have been enjoyed by the plaintiff from which, it is asserted, he must have known of the falsity of the statements made to him are a visit to the store, with opportunity to observe the stock in trade and to examine the books. With reference to the first we think it entirely open to inference whether mere observation of a dry goods store which, according to defendants' evidence contained from \$38,000 to \$40,000 worth of varied stock, would have made obvious to the plaintiff the impossibility of the total assets of the company equaling \$50,000. We apprehend that no one without a careful examination how boxes and drawers were filled and whether with the more or less valuable kinds of stock, could form even an estimate within twenty-five per cent. of the fact, besides which, of course, such observation would give no light whatever on the amount of the accounts receivable, which were outstanding and which of course constituted assets.

As to the books which were in evidence, they are voluminous set of double-entry books, covering all the details of purchases from day to day and of petty sales in a retail business. They consist of a ledger of nearly 600 pages, containing approximately 450 different accounts, several of which extend over many pages, not consecutively, but scattered throughout the book, without complete reference to each page in any index. The books and designation of the general accounts of the business are highly artificial and capable of giving or withholding information according as the examiner was familiar with the system of bookkeeping and also with the key to the exact meaning of the several accounts. For example, the merchandise account was closed in January, 1905, with an entry indicating a gross profit on merchandise of some \$9,000. Of course, a skilled bookkeeper would have understood that this apparent profit was subject to various deductions, but primarily for expense. Had he turned to the expense account, he would have found that to amount to but \$2,600, but he would not have discovered that various classes of expenditures were not included under the caption "expense," such as salaries and wages, insurance, advertising—each of considerable amount. Thus, unless familiar not only with the theory of double-entry bookkeeping, but with the meaning in which the bookkeeper used the titles to the accounts, he might have been deluded into an understanding that much profits had been made. True, the profit and loss account would not have shown any net profit, but in order that he must be charged with notice of the profit and loss account it must appear that he had knowledge of any such general balance account, which by the way is usually a characteristic of double-entry bookkeeping in form at least. Two of the witnesses most familiar with these books testified that, while

the facts might have been learned from them, they were apparent only to a skilled bookkeeper—to him only after sufficient critical examination to master the individual peculiarities. There was evidence that the plaintiff possessed no such skill; that he had no familiarity at all with double-entry bookkeeping or with its theory; that in his work as a dry goods clerk he had learned how to refer to certain accounts upon other sets of books, but nothing more. It seems to us, therefore, that the jury might well have drawn the conclusion that these books presented to him an incomprehensible maze of figures without meaning or significance, such as to blind rather than enlighten.

One item upon which defendants dwell is the "bills payable" account, which if understood would have shown an adverse balance of between \$21,000 and \$22,000 which they claim, with the verbal information to plaintiff that there was \$9,000 of indebtedness in addition to bills payable, as the fact apparently was, at once informed him that the indebtedness was as much as the fact \$32,000. But here again a key to the bookkeeper's terminology was essential to any such deduction. What did bills payable mean? Did it include or exclude bills owing to wholesale merchants for goods? The representation to plaintiff was that \$10,000 was owing to the bank and about \$9,000 to such merchants. The total of \$21,000 of the bills payable account would not be violently variant from the total, and on the page on which he must have looked it would have been apparent to a bookkeeper that at least one \$3,000 item included in that account represented indebtedness to J. V. Farwell & Co., well-known wholesale merchants; thus justifying an idea that the total covered not only indebtedness to the banks, but also indebtedness to merchants.

There is also evidence tending to prove that the only time when plaintiff sought to avail himself of the offered privilege of examining the books he was accompanied to the store on a Sunday by one of the defendants, who spread certain books upon a desk and then told him that he knew nothing about the bookkeeping and could not explain its meaning, whereby plaintiff was unable to gain any information therefrom. The only other actual exhibition of books was made on an evening when plaintiff was called to the store by telephone just as he was retiring for the night. Books were spread upon the table, but all three defendants were present and entered into various discussions with plaintiff and with each other as to the details of an arrangement by which he should come into the corporation the extent to which his name might be helpful and to which he should, for the welfare of the concern, have managerial prominence. We think on both occasions there was evidence from which the jury might have well believed not only that no adequate opportunity for the examination necessary to the understanding of the books was enjoyed by plaintiff, but the action of the defendants was such as to divert him therefrom.

To the foregoing facts may be added the consideration that the

defendants were all long-time acquaintances of the plaintiff, some had been his fellow workmen many years before, and a considerable intimacy of friendship had been maintained between them for a long time. Under such circumstances it has often been held that a positive assertion of a fact by the proposed seller may be thought by the trier of facts a sufficient diversion of the purchaser from availing himself of quite obvious opportunities for examination. We cannot avoid the conviction that the inference as to whether or not the falsity of the alleged misrepresentations was so apparent to the plaintiff that he must have known it, by the exercise of that care and observation which a person of ordinary care of equal intelligence and understanding would have exercised, was one for the jury, and that error was committed in granting the nonsuit. * * *

By THE COURT. Judgment reversed, and cause remanded for new trial.

IV. Falsity ¹⁰

LOMERSON v. JOHNSTON.

(Court of Errors and Appeals of New Jersey, 1890. 47 N. J. Eq. 312, 20 Atl. 675, 24 Am. St. Rep. 410.)

GARRISON, J.¹¹ We agree with the learned vice chancellor who heard this cause in all his conclusions upon the testimony. The case shows, in the clearest manner that Lomerson, the appellant, being involved with Mr. Johnston as surety and indorser, visited Mrs. Johnston for the purpose of securing himself against loss through the husband by obtaining from the wife a mortgage upon the house left to her by her father. The case further shows, and the vice chancellor so finds, that, in attaining this object, Lomerson made to Mrs. Johnston a number of statements, all tending to excite in her mind the liveliest apprehensions that her husband was about to be lodged in jail for debt. The court of chancery by its decree set aside the mortgage thus obtained, considering that it was executed under a species of duress. With the result reached we agree, resting our decision, however, upon the ground that it is inequitable to permit the complainant to retain a security for the husband's debt obtained by allowing a false apprehension as to the husband's danger to affect the mind of the wife. That this apprehension was the sole consideration for the wife's compliance is not more clear than that the efficient element of that

⁹ The remainder of the opinion is omitted.

¹⁰ For discussion of principles, see Chapin on Torts, § 88 (4).

¹¹ The statement of facts is omitted.

apprehension, namely, the belief in the imminence of the anticipated arrest, was not only false, but was so to the knowledge of Lomerson.

In order to establish a case of false representation it is not necessary that something which is false should have been stated as if it were true. If the presentation of that which is true creates an impression which is false, it is, as to him who, seeing the misapprehension, seeks to profit by it, a case of false representation. In the present instance, Mrs. Johnston naturally gathered from the statements made to her by Lomerson that her husband had committed crimes for which he not only could and would be imprisoned, but that his arrest was at hand. The imminence of the danger was the sole motive for the execution of the mortgage. In any other view of the transaction her haste is incomprehensible. Notwithstanding the importance of the demand made upon her, she took no time to reflect, held no consultation with her friends, sought no advice. Her one object was to act quickly—to be beforehand. And yet this notion of the imminence of her husband's arrest was just the one part of the impression produced upon her mind by Lomerson's statements, which was false, and which he knew to be false. From this time on the case becomes one of false representation, not because falsehoods were stated as if they were facts, but because the state of mind produced falsely represented the facts. To take advantage of such a state of mind is to profit by a false representation.

The decree below is affirmed, with costs.

For affirmance—The CHIEF JUSTICE, DIXON, GARRISON, MAGIE, REED, SCUDDER, VAN SYCKEL, BROWN, CLEMENT, COLE, SMITH, WHITAKER.

For reversal—None.

V. Scienter¹²

DERRY v. PEEK.

(House of Lords, 1889. 14 App. Cas. 337.)

Appeal from a decision of the Court of Appeal. The facts are set out at length in the report of the decisions below, 37 Ch. D. 541. For the present report the following summary will suffice:

By a special act (45 & 46 Vict. c. 159) the Plymouth, Devonport & District Tramways Company was authorized to make certain tramways.

By section 35 the carriages used on the tramways might be moved by animal power and, with the consent of the Board of Trade, by

¹² For discussion of principles, see Chapin on Torts, § 88 (5).

steam or any mechanical power for fixed periods and subject to the regulations of the Board.

By section 34 of the Tramways Act 1870 (33 & 34 Vict. c. 78), which section was incorporated in the said special act, "all carriages used on any tramway shall be moved by the power prescribed by the special act, and where no such power is prescribed, by animal power only."

In February, 1883, the appellants as directors of the company issued a prospectus containing the following paragraph:

"One great feature of this undertaking, to which considerable importance should be attached, is, that by the special act of Parliament obtained, the company has the right to use steam or mechanical motive power, instead of horses, and it is fully expected that by means of this a considerable saving will result in the working expenses of the line as compared with other tramways worked by horses."

Soon after the issue of the prospectus the respondent, relying, as he alleged, upon the representations in this paragraph and believing that the company had an absolute right to use steam and other mechanical power, applied for and obtained shares in the company.

The company proceeded to make tramways, but the Board of Trade refused to consent to the use of steam or mechanical power except on certain portions of the tramways.

In the result the company was wound up, and the respondent in 1885 brought an action of deceit against the appellants claiming damages for the fraudulent misrepresentations of the defendants whereby the plaintiff was induced to take shares in the company.

At the trial before Stirling, J., the plaintiff and defendants were called as witnesses. The effect given to their evidence in this House will appear from the judgments of noble and learned Lords.

Stirling, J., dismissed the action; but that decision was reversed by the Court of Appeal (Cotton, L. J., Sir J. Hannen, and Lopes, L. J.), who held that the defendants were liable to make good to the plaintiff the loss sustained by his taking the shares, and ordered an inquiry, 37 Ch. D. 541, 591. Against this decision the defendants appealed.

LORD HERSCHELL.¹⁸ My Lords in the statement of claim in this action the respondent, who is the plaintiff, alleges that the appellants made in a prospectus issued by them certain statements which were untrue, that they well knew that the facts were not as stated in the prospectus, and made the representations fraudulently, and with the view to induce the plaintiff to take shares in the company.

"This action is one which is commonly called an action of deceit, a mere common law action." This is the description of it given by Cotton, L. J., in delivering judgment. I think it important that it should

¹⁸ Parts of the opinion of Lord Herschell and all of the concurring opinions of Lord Chancellor Halsbury and of Lords Bramwell, Watson and Fitzgerald are omitted.

be borne in mind that such an action differs essentially from one brought to obtain rescission of a contract on the ground of misrepresentation of a material fact. The principles which govern the two actions differ widely. Where rescission is claimed it is only necessary to prove that there was misrepresentation; then, however honestly it may have been made, however free from blame the person who made it, the contract, having been obtained by misrepresentation, cannot stand. In an action of deceit, on the contrary, it is not enough to establish misrepresentation alone; it is conceded on all hands that something more must be proved to cast liability upon the defendant, though it has been a matter of controversy what additional elements are requisite. I lay stress upon this because observations made by learned judges in actions for rescission have been cited and much relied upon at the bar by counsel for the respondent. Care must obviously be observed in applying the language used in relation to such actions to an action of deceit. Even if the scope of the language used extend beyond the particular action which was being dealt with it must be remembered that the learned judges were not engaged in determining what is necessary to support an action of deceit, or in discriminating with nicety the elements which enter into it.

There is another class of actions which I must refer to also for the purpose of putting it aside. I mean those cases where a person within whose special province it lay to know a particular fact, has given an erroneous answer to an inquiry made with regard to it by a person desirous of ascertaining the fact for the purpose of determining his course accordingly, and has been held bound to make good the assurance he has given. *Burrowes v. Lock*, 10 Ves. 470, may be cited as an example, where a trustee had been asked by an intended lender, upon the security of a trust fund, whether notice of any prior incumbrance upon the fund had been given to him. In cases like this it has been said that the circumstance that the answer was honestly made in the belief that it was true affords no defence to the action. Lord Selborne pointed out in *Brownlie v. Campbell*, 5 App. Cas. at p. 935, that these cases were in an altogether different category from actions to recover damages for false representation, such as we are now dealing with.

One other observation I have to make before proceeding to consider the law which has been laid down by the learned judges in the Court of Appeal in the case before your Lordships. "An action of deceit is a common law action, and must be decided on the same principles, whether it be brought in the Chancery Division or any of the Common-Law Divisions, there being, in my opinion, no such thing as an equitable action for deceit." This was the language of Cotton, L. J., in *Arkwright v. Newbould*, 17 Ch. D. 320. It was adopted by Lord Blackburn in *Smith v. Chadwick*, 9 App. Cas. 193, and is not, I think, open to dispute.

In the Court below Cotton, L. J., said: "What in my opinion is a correct statement of the law is this, that where a man makes a statement to be acted upon by others which is false, and which is known by him to be false, or is made by him recklessly, or without care whether it is true or false, that is, without any reasonable ground for believing it to be true, he is liable in an action of deceit at the suit of any one to whom it was addressed or any one of the class to whom it was addressed and who was materially induced by the misstatement to do an act to his prejudice." About much that is here stated there cannot, I think, be two opinions. But when the learned Lord Justice speaks of a statement made recklessly or without care whether it is true or false, that is without any reasonable ground for believing it to be true, I find myself, with all respect, unable to agree that these are convertible expressions. To make a statement careless whether it be true or false, and therefore without any real belief in its truth, appears to me to be an essentially different thing from making, through want of care, a false statement, which is nevertheless honestly believed to be true. And it is surely conceivable that a man may believe that what he states is the fact, though he has been so wanting in care that the Court may think that there were no sufficient grounds to warrant his belief. I shall have to consider hereafter whether the want of reasonable ground for believing the statement made is sufficient to support an action of deceit. I am only concerned for the moment to point out that it does not follow that it is so, because there is authority for saying that a statement made recklessly, without caring whether it be true or false, affords sufficient foundation for such an action. * * *

It will thus be seen that all the learned judges concurred in thinking that it was sufficient to prove that the representations made were not in accordance with fact, and that the person making them had no reasonable ground for believing them. They did not treat the absence of such reasonable ground as evidence merely that the statements were made recklessly, careless whether they were true or false, and without belief that they were true, but they adopted as the test of liability, not the existence of belief in the truth of the assertions made, but whether the belief in them was founded upon any reasonable grounds. It will be seen, further, that the court did not purport to be establishing any new doctrine. They deemed that they were only following the cases already decided, and that the proposition which they concurred in laying down was established by prior authorities. Indeed, Lopes, L. J., expressly states the law in this respect to be well settled. This renders a close and critical examination of the earlier authorities necessary.

I need go no further back than the leading case of *Pasley v. Freeman*, 2 Smith's L. C. 74. If it was not there for the first time held that action of deceit would lie in respect of fraudulent representations against a person not a party to a contract induced by them, the

law was at all events not so well settled but that a distinguished judge, Grose, J., differing from his brethren on the bench, held that such an action was not maintainable. Buller, J., who held that the action lay, adopted in relation to it the language of Croke, J., in 3 Bulstrode, 95, who said: "Fraud without damage or damage without fraud gives no cause of action, but where these two concur an action lies." * * *

Having now drawn attention, I believe, to all the cases having a material bearing upon the question under consideration, I proceed to state briefly the conclusions to which I have been led. I think the authorities establish the following propositions: First, in order to sustain an action of deceit, there must be proof of fraud, and nothing short of that will suffice. Secondly, fraud is proved when it is shewn that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, careless whether it be true or false. Although I have treated the second and third as distinct cases, I think the third is but an instance of the second, for one who makes a statement under such circumstances can have no real belief in the truth of what he states. To prevent a false statement being fraudulent, there must, I think, always be an honest belief in its truth. And this probably covers the whole ground, for one who knowingly alleges that which is false has obviously no such honest belief. Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

I think these propositions embrace all that can be supported by decided cases from the time of *Pasley v. Freeman* down to *Western Bank of Scotland v. Addie* in 1867, Law Rep. 1 H. L. Sc. 145, when the first suggestion is to be found that belief in truth of what he has stated will not suffice to absolve the defendant if his belief be based on no reasonable grounds. I have shewn that this view was at once dissented from by Lord Cranworth so that there was at the outset as much authority against it as for it. And I have met with no further assertion of Lord Chelmsford's view until the case of *Weir v. Bell*, 3 Ex. D. 238, where it seems to be involved in Lord Justice Cotton's enunciation of the law of deceit. But no reason is there given in support of the view; it is treated as established law. The dictum of the late Master of the Rolls that a false statement made through carelessness, which the person making it ought to have known to be untrue, would sustain an action of deceit, carried the matter still further. But that such an action could be maintained notwithstanding an honest belief that the statement made was true, if there were no reasonable grounds for the belief, was, I think, for the first time decided in the case now under appeal.

In my opinion making a false statement through want of care falls far short of, and is a very different thing from, fraud, and the same may be said of a false representation honestly believed though on in-

sufficient grounds. Indeed Cotton, L. J., himself indicated, in the words I have already quoted, that he should not call it fraud. But the whole current of authorities, with which I have so long detained your Lordships, shews to my mind conclusively that fraud is essential to found an action of deceit, and that it cannot be maintained where the acts proved cannot properly be so termed. And the case of *Taylor v. Ashton*, 11 M. & W. 401, appears to me to be in direct conflict with the dictum of Sir George Jessel, and inconsistent with the view taken by the learned judges in the court below. I observe that Sir Frederick Pollock, in his able work on Torts (page 243, note), referring, I presume, to the dicta of Cotton, L. J., and Sir George Jessel, M. R., says that the actual decision in *Taylor v. Ashton*, 11 M. & W. 401, is not consistent with the modern cases on the duty of directors of companies. I think he is right. But for the reasons I have given I am unable to hold that anything less than fraud will render directors or any other persons liable to an action of deceit.

At the same time I desire to say distinctly that when a false statement has been made the questions whether there were reasonable grounds for believing it, and what were the means of knowledge in the possession of the person making it, are most weighty matters for consideration. The ground upon which an alleged belief was founded is a most important test of its reality. I can conceive many cases where the fact that an alleged belief was destitute of all reasonable foundation would suffice of itself to convince the court that it was not really entertained, and that the representation was a fraudulent one. So, too, although means of knowledge are, as was pointed out by Lord Blackburn in *Brownlie v. Campbell*, 5 App. Cas. at p. 952, a very different thing from knowledge, if I thought that a person making a false statement had shut his eyes to the facts, or purposely abstained from inquiring into them, I should hold that honest belief was absent, and that he was just as fraudulent as if he had knowingly stated that which was false.

I have arrived with some reluctance at the conclusion to which I have felt myself compelled, for I think those who put before the public a prospectus to induce them to embark their money in a commercial enterprise ought to be vigilant to see that it contain such representations only as are in strict accordance with fact, and I should be very unwilling to give any countenance to the contrary idea. I think there is much to be said for the view that this moral duty ought to some extent to be converted into a legal obligation, and that the want of reasonable care to see that statements, made under such circumstances, are true, should be made an actionable wrong. But this is not a matter fit for discussion on the present occasion. If it is to be done the legislature must intervene and expressly give a right of action in respect of such a departure from duty. It ought not, I think to be done by straining the law, and holding that to be fraudulent which the tribunal feels cannot properly be so described. I think mischief is likely

to result from blurring the distinction between carelessness and fraud, and equally holding a man fraudulent whether his acts can or cannot be justly so designated.

It now remains for me to apply what I believe to be the law to the facts of the present case. * * *

I agree with the court below that the statement made did not accurately convey to the mind of a person reading it what the rights of the company were, but to judge whether it may nevertheless have been put forward without subjecting the defendants to the imputation of fraud, your Lordships must consider what were the circumstances. By the General Tramways Act of 1870 it is provided that all carriages used on any tramway shall be moved by the power prescribed by the special act, and where no such power is prescribed, by animal power only. 33 & 34 Vict. c. 78, § 34. In order, therefore, to enable the company to use steam power, an act of Parliament had to be obtained empowering its use. This had been done, but the power was clogged with the condition that it was only to be used with the consent of the Board of Trade. It was therefore incorrect to say that the company had the right to use steam; they would only have that right if they obtained the consent of the Board of Trade. But it is impossible not to see that the fact which would impress itself upon the minds of those connected with the company was that they had, after submitting the plans to the Board of Trade, obtained a special act empowering the use of steam. It might well be that the fact that the consent of the Board of Trade was necessary would not dwell in the same way upon their minds, if they thought that the consent of the Board would be obtained as a matter of course if its requirements were complied with and that it was therefore a mere question of expenditure and care. The provision might seem to them analogous to that contained in the General Tramways Act, and I believe in the Railways Act also, prohibiting the line being opened until it had been inspected by the Board of Trade and certified fit for traffic, which no one would regard as a condition practically limiting the right to use the line for the purpose of a tramway or railway. I do not say that the two cases are strictly analogous in point of law, but they may well have been thought so by business men.

I turn now to the evidence of defendants. * * * (Lord Herschell here reviewed the evidence of each of the five defendants.)

As I have said, Stirling, J., gave credit to these witnesses and I see no reason to differ from him. What conclusion ought to be drawn from their evidence? I think they were mistaken in supposing that the consent of the Board of Trade would follow as a matter of course because they had obtained their act. It was absolutely in the discretion of the Board whether such consent should be given. The prospectus was therefore inaccurate. But that is not the question. If they believed that the consent of the Board of Trade was practically con-

cluded by the passing of the act, has the plaintiff made out, which it was for him to do, that they have been guilty of a fraudulent misrepresentation? I think not. I cannot hold it proved as to any one of them that he knowingly made a false statement, or one which he did not believe to be true, or was careless whether what he stated was true or false. In short, I think they honestly believed that what they asserted was true, and I am of opinion that the charge of fraud made against them has not been established. * * *

Adopting the language of Jessel, M. R., in *Smith v. Chadwick*, 20 Ch. D. at page 67, I conclude by saying that on the whole I have come to the conclusion that the statement, "though in some respects inaccurate and not altogether free from imputation of carelessness, was a fair, honest and bona fide statement on the part of the defendants, and by no means exposes them to an action for deceit."

I think the judgment of the Court of Appeal should be reversed.

VI. Damage ¹⁴

URTZ v. NEW YORK CENT. & H. R. R. Co.

(Court of Appeals of New York, 1911. 202 N. Y. 170, 95 N. E. 711.)

The action is to recover the damages sustained by the plaintiff through the false representations made to her by the defendant.

April 9, 1906, the plaintiff's husband and intestate was killed at a highway crossing of defendant's railroad through a collision between an engine of the defendant and a wagon in which the intestate was riding. The team of the intestate was also killed and his wagon demolished. One McCormick was a division claim agent of defendant, and it was his duty to investigate the accident and report the facts to its chief claim agent with his opinion as to its liability. He investigated the circumstances surrounding the accident, and then entered upon a series of misrepresentations to both the plaintiff and defendant. The result of those to the defendant was that on April 17, 1906, he was authorized by it to settle with the plaintiff on the best terms he could within the sum of \$2,500, and on April 27th the defendant forwarded to him its check for \$2,250, payable to the order of and to be delivered to the plaintiff upon the execution by her of a voucher and a general release of her claim. On April 30th McCormick told the plaintiff that he had looked up all the facts and talked with everybody who knew anything about the case; he had found out that the intestate was drunk and when a man told him that the train was coming he said he could take care of himself, and he didn't care whether the train was

¹⁴ For discussion of principles, see Chapin on Torts, § 88 (6).

coming or not; the train was going eight miles an hour and the bell was ringing and the whistle blowing; one could see up and down the track for half a mile at the point of the accident; he would pay well for the team and wagon but not for killing the intestate, as the law was now that they would not have to pay for anything only property; the team and wagon were worth about \$200 and the defendant wanted to be liberal and made it \$500, and that was all it would pay. The plaintiff on that occasion accepted \$500 in full settlement of her claim and signed the voucher and release. She subsequently brought this action, alleging by her complaint that all the representations made by McCormick were false and fraudulent and induced her to make the settlement and demanding judgment for the damages she had thereby sustained. At the trial the plaintiff introduced evidence in proof of the false and fraudulent nature of the statements of McCormick and her reliance thereon, and the defendant introduced opposing evidence. The trial judge in his charge instructed the jury in substance that, if they found that the statements made by McCormick were misrepresentations of facts and were fraudulently made and were relied upon by the plaintiff, then she was entitled to recover as damages "the amount the plaintiff could reasonably obtain on a settlement where nothing but the true facts were given or relied upon, deduct from that the amount paid, and the residue would be the recovery. In other words, how much could the plaintiff reasonably have demanded and received from the defendant by way of settlement if these false representations had not been made?" The defendant's counsel requested the judge to charge that the plaintiff, in order to maintain the action, must show, in the first instance, that she had a valid and existing claim against the defendant originally, and the judge responded: "I refuse to charge in that language. She must show that there was a claim which was disputed and contested; that she was alleging a claim based upon facts sufficient that she could reasonably apprehend that she had a just claim and that the defendant could also feel that she had a just claim." Proper exceptions thereto were taken. The verdict of the jury in favor of plaintiff was unanimously affirmed.

COLLIN, J.¹⁵ In an action for the recovery of damages caused by the fraud of the defendant, the plaintiff must allege and prove that he has been injured by the fraud which he charges. The essential constituents of the action are firmly fixed and are tersely stated in *Arthur v. Griswold*, 55 N. Y. 400, as "representation, falsity, scienter, deception and injury." Pecuniary loss to the deceived party is absolutely essential to the maintenance of the action. Fraud and deceit alone do not warrant the recovery of damages. Deceit and injury must concur. *Taylor v. Guest*, 58 N. Y. 262; *Ettlinger v. Weil*, 184 N. Y. 179, 77 N. E. 31.

¹⁵ A portion of the opinion of Collin, J., and all the dissenting opinion of Vann, J., is omitted.

In the action at bar the plaintiff was not defrauded by the transactions between herself and McCormick unless, as a result thereof, she lost something of value. In case that result was a gain to her or purely negative, representing neither gain nor loss, clearly there is no room for the application thereto of any rule of damages; the enforcement of any measure of damages, when loss and damage are wholly lacking, is impossible and inconceivable. *Dung v. Parker*, 52 N. Y. 494; *Hicks v. Deemer*, 187 Ill. 164, 58 N. E. 252. In *Hicks v. Deemer*, *supra*, the action was to recover the damages sustained by the plaintiff because of the false representations on the part of the defendants, in that they induced the plaintiff to convey his interest in certain land under the erroneous belief created by defendants' deceit that he owned only a life estate therein, whereas, as he alleged, he was the owner in fee simple. At the trial the plaintiff gave evidence supporting his absolute ownership, and the defendants sought to prove that his sole estate was an interest for his life. The court held that plaintiff's right of action depended upon his ownership of the fee and that the trial court erred in refusing to charge the jury that before they could find injury and damage to the plaintiff they must find that he was the owner in fee simple of the land.

The jury, in the case here, found that the deceit of the defendant moved the plaintiff to release unto the defendant, in consideration of the sum of \$500, whatever right or cause of action she had against it through the killing of her husband. Unless the right of action had a value and a value greater than \$500, the plaintiff was not defrauded. If what she parted with had a value and a value less than or only equal to the value of that which she received, she was not injured; if greater, she was injured and in a sum equal to its excess of value. The basic principle underlying all rules for the measurement of damages in actions for fraud and deceit is indemnity for the actual pecuniary loss sustained as the direct result of the wrong. *Krumm v. Beach*, 96 N. Y. 398. Neither advantage nor disadvantage resulting to the plaintiff from the settlement enters in any way into our consideration. The question is, What was the value of that with which plaintiff parted and what was the value of that which she received? If the plaintiff's claim against the defendant had been based upon an alleged promissory note made by defendant, and McCormick had effected a compromise thereof by false and fraudulent statements as to defendant's solvency and the existence of a counterclaim, she, in an action to recover her damages caused by the fraud, must have given evidence in proof of the validity of the note to afford the jury a starting point for the measurement of her damages, and if they found that the note was forged and not made by defendant, they would find also that she had sustained no damage and could not maintain the action. Unless she had the valid note of the defendant, she had and released in the compromise nothing of value. Resuming the discussion of the present case, the jury were bound, having found the fraud, to determine whether

the plaintiff was injured through the fraud, and, if injured, the sum of her damages. In case the right of action had no value, she had gained by the transaction and was not injured. It had no value whatever if the true state of facts disclosed that it was an invalid and non-existing claim, or, in other words, that the defendant was not negligent, or, if the defendant was negligent, that the intestate was not free from contributory negligence. If, however, the true state of facts would have established that the defendant was negligent and the intestate free from contributory negligence, then the plaintiff had a valuable right of action, the acquirement of which through the fraud may have injured her. Until the jury found the real facts and that they created a valid claim against the defendant, they had not a basis for estimating the damages the plaintiff had sustained. The action is not to enforce or vacate the compromise, but to recover the actual pecuniary loss sustained by the plaintiff. An alleged value of the claim based upon the accident and the death or facts sufficient to warrant the reasonable belief of the plaintiff that she had a just claim is of a nature too speculative and wagering to be recognized by the law in this action for fraud. The jury in considering the question of damages should first ascertain whether or not the plaintiff was originally entitled to a recovery of some amount. Otherwise they could not determine whether, by executing the release, she parted with value, and if they could not determine that, they could not decide whether or not she was damaged. Through what method or by what means would they be able to know that the sum of \$500 was not equal to the fair value of the right of action until they knew that the right of action had validity and would entitle her to some amount? She was entitled to the fair value of this disputed claim, but that value must be ascertained through a rule possessing reasonable certainty and working a reasonably just result. If the jury determine that she was not originally entitled to recover, then their verdict would be for the defendant. If they determine that she was entitled to recover, then they would proceed to measure the damages, and the rule by which they should be guided therein has been clearly expressed by us in *Gould v. Cayuga County National Bank*, 99 N. Y. 333, 2 N. E. 16. Assuming that the parties meant to avoid litigation and compromise their dispute, and that the true facts and defendant's contradiction of them were disclosed, how much could the plaintiff have reasonably demanded and the defendant reasonably have allowed as a final compromise above and beyond the \$500, in fact allowed and received? That the jury must answer. They would take into view the probabilities of the successful enforcement of the cause of action, the probable extent and expense of the expected litigation over this disputed claim, the law's delays, the probability of the continuing solvency of the defendant and such other facts pertinent to the question of damages as the evidence presented. What under all the conditions and circumstances was this claim of the plaintiff, valid un-

der the true, yet opposed, and contradicted, state of facts, worth for purpose of sale, transfer or cancellation, if anything at all, above the \$500? * * *

CULLEN, C. J., GRAY and WERNER, JJ., concur with COLLIN, J. HISCOCK, J., concurs with VANN, J. HAIGHT, J., absent.

Judgment reversed, etc.

SLANDER OF TITLE ¹

DOOLING v. BUDGET PUB. CO.

(Supreme Judicial Court of Massachusetts, 1887. 144 Mass. 258, 10 N. E. 809, 59 Am. Rep. 83.)

Tort, for an alleged libel, contained in the following words: "Probably never in the history of the Ancient and Honorable Artillery Company was a more unsatisfactory dinner served than that of Monday last. One would suppose, from the elaborate bill of fare, that a sumptuous dinner would be furnished by the caterer, Dooling; but instead, a wretched dinner was served, and in such a way that even hungry barbarians might justly object. The cigars were simply vile, and the wines not much better."

At the trial in the Superior Court, before Pitman, J., the publication of the words by the defendant was admitted.

The plaintiff's counsel, in opening the case to the jury, stated that the plaintiff was a caterer in the city of Boston with a very large business, and acted as caterer upon the occasion referred to. Upon the statement of the plaintiff's counsel that he should offer no evidence of special damage, the judge ruled, without reference to any question of privilege that might be involved in the case, that the words set forth were not actionable per se, and that the plaintiff could not maintain his action without proof of special damage, and, the plaintiff's counsel still stating that he should offer no evidence of special damage, directed a verdict for the defendant, and reported the case for the determination of this court.

If the ruling was correct, judgment was to be entered on the verdict; otherwise the case to stand for a new trial.

C. ALLEN, J. The question is whether the language used imports any personal reflection upon the plaintiff in the conduct of his business, or whether it is merely in disparagement of the dinner which he provided. Words relating merely to the quality of articles made, produced, furnished, or sold by a person, though false and malicious, are not actionable without special damage. For example, the condemnation of books, paintings, and other works of art, music, architecture, and generally of the product of one's labor, skill, or genius, may be unsparing, but it is not actionable without the averment and proof of special damage, unless it goes further, and attacks the individual. *Gott v. Pulsifer*, 122 Mass. 235, 23 Am. Rep. 322; *Swan v. Tappan*, 5 Cush. 104; *Tobias v. Harland*, 4 Wend. (N. Y.) 537; *Western Coun-*

¹ For discussion of principles, see Chapin on Torts, §§ 89, 90.

ties *Manure Co. v. Lawes Chemical Manure Co.*, L. R. 9 Ex. 218; *Young v. Macrae*, 3 B. & S. 264; *Ingram v. Lawson*, 6 Bing. N. C. 212. Disparagement of property may involve an imputation on personal character or conduct, and the question may be nice, in a particular case, whether or not the words extend so far as to be libelous, as in *Bignell v. Buzzard*, 3 H. & N. 217.

The old case of *Fen v. Dixie*, W. Jones, 444, is much in point. The plaintiff there was a brewer, and the defendant spoke of his beer in terms of disparagement at least as strong as those used by the present defendant in respect of the plaintiff's dinner, wines, and cigars; but the action failed for want of proof of special damage.

In *Evans v. Harlow*, 5 Q. B. 624, 631, Lord Denman, C. J., said: "A tradesman offering goods for sale exposes himself to observations of this kind; and it is not by averring them to be 'false, scandalous, malicious, and defamatory' that the plaintiff can found a charge of libel upon them."

In the present case there was no libel on the plaintiff, in the way of his business. Though the language used was somewhat strong, it amounts only to a condemnation of the dinner and its accompaniments. No lack of good faith, no violation of agreement, no promise that the dinner should be of a particular quality, no habit of providing dinners, which the plaintiff knew to be bad, is charged, nor even an excess of price beyond what the dinner was worth; but the charge was, in effect, simply that the plaintiff, being a caterer, on a single occasion, provided a very poor dinner, vile cigars, and bad wines. Such a charge is not actionable, without proof of special damage.

Judgment on the verdict.

INTERFERENCE WITH CONTRACTUAL RIGHTS

I. Prospective Contracts of Employment ¹

FOLSOM v. LEWIS.

(Supreme Judicial Court of Massachusetts, 1911. 208 Mass. 336, 94 N. E. 316, 35 L. R. A. [N. S.] 787.)

Bill by Lucius B. Folsom and others against George F. Lewis and others. From a decree for plaintiffs, defendants appeal.

The injunction contained the following, amongst other, provisions: "And they are further enjoined from, in any way, directly or indirectly, continuing or proceeding with or causing to be continued or proceeded with the strike referred to in these proceedings for the purpose of compelling the plaintiffs to enter into any agreement with the union as such to employ none but union men, or for the purpose of directly or indirectly compelling the plaintiffs to unionize their shop or to run a closed shop or to employ none but union men, and from directly or indirectly paying to any one any strike benefit in the furtherance of the strike referred to in these proceedings, and from paying or furnishing to any person or persons, partnership or corporation, any money, property or other consideration to induce any person to leave or refrain from entering the employment of the plaintiffs in pursuance of the purposes enumerated."

KNOWLTON, C. J. This is one of ten bills in equity, brought by different parties and heard together before a master, to obtain an injunction to restrain the defendants from calling or declaring any strike, and from proceeding with any strike already called, to "unionize" the plaintiffs' shop, from inducing or persuading persons under contracts of employment to break them, and from conspiring or combining to prevent any person, by threats, picketing or intimidation, from entering or continuing in the employ of the plaintiffs, and to recover damages. Exceptions were taken by both parties to the report of the master, and, after a hearing, the plaintiffs' exceptions were sustained and the defendants' exceptions overruled. A decree for the plaintiffs was entered, and the defendants appealed.

There was a strike by the Boston Photo-Engravers' Labor Union against all the nonunion employers of photo-engravers in Boston. The master found "that one of the objects of the strike was to compel the employers to recognize the union as such, to employ none but union men, or nonunion men provided they should join the union within 30

¹ For discussion of principles, see Chapin on Torts, § 91.

days, and after a certificate of the right to work until the time that they had joined the union, and that the strike was a strike for the closed shop." He therefore found and ruled that the strike was not for a lawful object in these particulars.

The principal contention before us is that this finding is plainly wrong. The evidence upon this part of the case is not before us, except as the master has reported a large number of evidential facts most, if not all, of which appear to be unquestioned, upon which his conclusion is founded. The only evidence that he was asked to report was that on the claim for damages.

The matters stated in the report amply justify, if they do not require, the finding of this conclusion by the master. The general course of proceedings of the local union and its officers, and the International Photo-Engravers' Union with which the local union was connected, and the officers of the International Union, some of whom were in Boston several months before the strike was called, seemingly engaged in the work of trying to obtain control of the labor in all the shops in Boston and to compel the assent by the employers to an agreement which should establish the closed shop in this business in Boston, all tend to support this finding of the master. While certain concessions were asked for in the interest of the men, just before the strike was ordered, most, if not all, of which the employers seem to have been willing to grant, the part of the proposed agreement which the representatives of the union absolutely insisted upon was article 8: "That the employing photo-engravers signing this agreement shall employ none but members of the International Photo-Engravers' Union of North America, or applicants for positions holding a permit from the Boston Photo-Engravers' Union, No. 3, P. E. U." There is nothing in the case to indicate that there was anything in the condition of the business, or in the relations of the workmen to their employers, that made such a requirement of any importance to these employes, in reference to their profit or comfort, or other direct interest as employes. The master was undoubtedly right in finding that the purpose of the defendants and the real object of the strike was not so much to obtain certain slight advantages referred to in the proposed agreement, as to compel the employers by inflicting this injury upon them, to submit to an attempt to obtain for the union a complete monopoly of the labor market in this kind of business, by forcing all laborers who wished to work to join the union, and by forcing all employers to agree not to employ laborers, except upon such terms as they could make with the combination that should control all labor in this business. This has been held to go beyond the limit of justifiable competition. Conduct directly affecting an employer to his detriment, by interference with his business, is not justifiable in law, unless it is of a kind and for a purpose that has a direct relation to benefits that the laborers are trying to obtain. Strengthening the forces of a labor union, to put it in a

better condition to enforce its claims in controversies that may afterwards arise with employers, is not enough to justify an attack upon the business of an employer by inducing his employés to strike. *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738; *Plant v. Woods*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638.

This most important part of the decision of the master and of the judge is well sustained.

There was also a finding that the defendants interfered with persons who were under contracts with the plaintiffs for future service, by inducing them to break their contracts. This too was a special wrong which was a proper subject for an injunction.

There was evidence well warranting the finding of the master on the question of damages.

Decree affirmed with costs.

II. Prospective Contracts Not of Employment²

MACAULEY BROS. v. TIERNEY.

(Supreme Court of Rhode Island, 1895. 19 R. I. 255, 33 Atl. 1, 37 L. R. A. 455, 61 Am. St. Rep. 770.)

MATTESON, C. J.³ The complainants are master plumbers, engaged in the business of plumbing. In the transaction of their business, they have been accustomed, and are obliged to purchase from time to time materials from wholesale dealers in Rhode Island and other parts of the United States, and, among others, from L. H. Tillinghast & Co., of Providence, who, with the New England Supply Company, are the only wholesale dealers in plumbing materials in this state. The respondents are also master plumbers, and officers and members of the Providence Master Plumbers' Association, a voluntary association, affiliated with the National Association of Master Plumbers of the United States of America. The latter association, on June 26, 1894, at Baltimore, in convention assembled, adopted resolutions that they would withdraw their patronage from any firm manufacturing or dealing in plumbing material selling to others than master plumbers; that the masters should demand of manufacturers and wholesale dealers in plumbing material to sell goods to none but master plumbers; that

² For discussion of principles, see Chapin on Torts, § 92.

³ A portion of the opinion is omitted.

the association should keep a record of all journeymen and plumbers who place in buildings plumbing material bought by consumers of manufacturers or dealers; that a committee be appointed by the association in every state and county for the purpose of reporting to the proper officers, at its head office in the state, any violations of these resolutions; that the convention urge upon the association to perfect and adopt a uniform system of protection for the trade over their entire jurisdiction. Subsequently, a resolution of amendment was adopted, at St. Louis, that the interpretation of the resolutions be left in the hands of the executive committee with power. Still later, a resolution was adopted, at Washington, "that it is the sense of this convention that in the future the interpretation of the term of 'master plumber,' as set forth in the above resolutions, to entitle him to purchase plumbing material, be construed to mean master plumbers that have qualified under state or local enactments where such exist."

It is alleged by the complainants that the interpretation put by the executive committee of the National Association on these resolutions is that those only are to be regarded as master plumbers who are members of the National Association, or members of the several local associations affiliated with the National Association; that the complainants have been informed by various wholesale dealers in plumbing materials in the United States outside of this state that they will not sell them supplies unless they shall join the Providence Master Plumbers' Association, and that these dealers are forced to refuse to sell them supplies because of the resolutions referred to and the interpretation put upon them by the executive committee of the National Association, and because of the action of the Providence Master Plumbers' Association in causing such dealers to be notified not to sell to the complainants, under the penalty, in case of their continuing to do so, of not selling to any member of the association; that the Providence Master Plumbers' Association, acting through the respondents, has issued notice to L. H. Tillinghast & Co. and the New England Supply Company to sell supplies to none but members of the association; and that, in consequence of these notices, these wholesale dealers have notified the complainants and other master plumbers that they will not sell plumbing materials to plumbers not members of the Master Plumbers' Associations in the places in which they do a plumbing business, or members of the National Association; and that, since the date limited in the notices, these dealers have refused to sell to the complainants; and that they have been unable to purchase supplies from them and from other wholesale dealers in the United States, because they are not members of the Providence Master Plumbers' Association. The bill charges that the Providence Master Plumbers' Association and the National Association have conspired together to prevent the complainants from buying supplies anywhere in the United States, and to utterly ruin their business, unless

they will submit to the conditions of membership in and become members of the Providence Master Plumbers' Association; avers that the business of the complainants will be irremediably ruined unless the respondents are enjoined from further action, and are compelled to rescind the action which they have already taken; and prays that the respondents may be directed to rescind the notices given, and all orders and requests, both oral and written, to any and all dealers in plumbers' supplies, not to trade with such dealers, unless they shall refuse to sell supplies to any but members of such associations, and to rescind and withdraw any and all orders and requests to the National Association to prevent wholesale dealers outside of the state of Rhode Island from selling supplies to the complainants; and that the respondents may be enjoined from all further interference with the complainants by notifying such dealers not to sell to them, or by further requests to said National Association to prevent them from buying supplies anywhere in the United States. Testimony has been submitted by the complainants tending to prove the allegations of the bill.

Assuming that the allegations are fully sustained by the proof, have the complainants made a case entitling them to relief? We think not. The complainants proceed on the theory that they are entitled to protection in the legitimate exercise of their business; that the sending of the notices to wholesale dealers not to sell supplies to plumbers not members of the association, under the penalty, expressed in some instances and implied in others, of the withdrawal of the patronage of the members of the associations in case of a failure to comply, was unlawful, because it was intended to injuriously affect the plumbers not members of the association in the conduct of their business, and must necessarily have that effect. It is doubtless true, speaking generally, that no one has a right intentionally to do an act with the intent to injure another in his business. Injury, however, in its legal sense, means damage resulting from a violation of a legal right. It is this violation of a legal right which renders the act wrongful in the eye of the law, and makes it actionable. If, therefore, there is a legal excuse for the act, it is not wrongful, even though damage may result from its performance. The cause and excuse for the sending of the notices, it is evident, was a selfish desire on the part of the members of the association to rid themselves of the competition of those not members, with a view to increasing the profits of their own business. The question, then, resolves itself into this: Was the desire to free themselves from competition a sufficient excuse, in legal contemplation, for the sending of the notices? We think the question must receive an affirmative answer. Competition, it has been said, is the life of trade. Every act done by a trader for the purpose of diverting trade from a rival, and attracting it to himself, is an act intentionally done, and, in so far as it is successful, to the injury of the rival in his business, since to that ex-

tent it lessens his gains and profits. To hold such an act wrongful and illegal would be to stifle competition. Trade should be free and unrestricted; and hence every trader is left to conduct his business in his own way, and cannot be held accountable to a rival who suffers a loss of profits by anything he may do, so long as the methods he employs are not of the class of which fraud, misrepresentation, intimidation, coercion, obstruction, or molestation of the rival or his servants or workmen, and the procurement of violation of contractual relations, are instances.

A leading and well-considered case on this subject was *Steamship Co. v. McGregor*, [1892] 23 Q. B. Div. 598, App. Cas. 25. In this case the defendants, who were shipowners, had formed a league for the purpose of keeping in their own hands the control of the tea-carrying trade between London and China, and for the purpose of driving the plaintiff and other competing shipowners from the field. The acts complained of as unlawful by which the defendants sought to accomplish their purpose were: (1) The offer to local shippers and other agents of a benefit by way of rebate if they would not deal with the plaintiff, which was to be lost if this condition was not fulfilled; (2) the sending of special ships to Hankow, in the hope by competition to deprive the plaintiff's vessels of profitable freight; (3) the offer at Hankow of freights at so low a rate as not to repay the shipowner for his adventure, in order to smash freights and frighten the plaintiff from the field; (4) pressure put on their own agents to induce them to ship only by the defendants' vessels, and not by the plaintiff's. The plaintiff alleged that the league was a conspiracy, and claimed damages and an injunction against a continuance of the alleged unlawful acts. It was held that since the acts of the defendants were not in themselves unlawful, and were done by them with the lawful object of protecting and extending their own trade and increasing their profits and as they had employed no unlawful means, the plaintiff had no cause of action. Bowen, L. J., remarks (page 614): "His [the trader's] right to trade freely is a right which the law recognizes and encourages, but it is one which places him at no special disadvantage as compared with others. No man, whether trader or not, can, however, justify damaging another in his commercial business by fraud or misrepresentation. Intimidation, obstruction, and molestation are forbidden; so is intentional procurement of the violation of individual rights, contractual or other, assuming, always, that there is no just cause for it. The intentional driving away of customers by show of violence (*Tarleton v. McGawley*, Peake, 270); the obstruction of actors on the stage by preconcerted hissing (*Clifford v. Brandon*, 2 Camp. 358; *Gregory v. Brunswick*, 6 Man. & G. 205); the disturbance of wild fowl in decoys by the firing of guns (*Carrington v. Taylor*, 11 East, 571; *Keeble v. Hickeringall*, Id. 574, note); the impeding or threatening of servants or workmen (*Garret v. Taylor*, Cro. Jac. 567); the inducing of persons under personal con-

tracts to break their contracts (*Bowen v. Hall*, L. R. 6 Q. B. Div. 333; *Lumley v. Gye*, 2 El. & Bl. 216)—all are instances of such forbidden acts. But the defendants have been guilty of none of these acts. They have done nothing more against the plaintiffs than to pursue to the bitter end a war of competition waged in the interest of their own trade. To the argument that competition so pursued ceases to have a just cause or excuse when there is ill will or personal intention to do harm, it is sufficient to reply * * * that there was here no personal intention to do any other or greater harm to the plaintiffs than such as was necessarily involved in the desire to attract to the defendants' ships the entire tea freights of the ports, a portion of which would otherwise have fallen to the plaintiffs' share. I can find no authority for the doctrine that such a commercial motive deprives of 'just cause or excuse' acts done in the course of trade which would be but for such motive justifiable. So to hold would be to convert into an illegal motive the instinct of self-advancement and self-protection, which is the very incentive to all trade. To say that a man is to trade freely, but that he is to stop short at any act which is calculated to harm other tradesmen, and which is designed to attract business to his own shop, would be a strange and impossible counsel of perfection." The case at bar contains no element of the character of those enumerated by the lord justice which are forbidden by law, unless the threat of the withdrawal of patronage may be considered as amounting to coercion. We do not think, however, that such a threat can be regarded as coercive within a legal sense; for, though coercion may be exerted by the application of moral as well as physical force, the moral force exerted by the threat was a lawful exercise by the members of the associations of their own rights, and not the exercise of a force violative of the rights of others, as in the cases cited by the lord justice. It was perfectly competent for the members of the association, in the legitimate exercise of their own business, to bestow their patronage on whomsoever they chose, and to annex any condition to the bestowal which they saw fit. The wholesale dealers were free to comply with the condition or not, as they saw fit. If they value the patronage of the members of the associations more than that of the nonmembers, they would doubtless comply; otherwise, they would not. * * *

It only remains to notice the charge of conspiracy contained in the bill, upon which considerable stress has been laid, as though the fact that the action of the members of the associations was in pursuance of a combination entitled the complainants to relief. To maintain a bill on the ground of conspiracy, it is necessary that it should appear that the object relied on as the basis of the conspiracy, or the means used in accomplishing it, were unlawful. What a person may lawfully do, a number of persons may unite with him in doing, without rendering themselves liable to the charge of conspiracy, provided the means employed be not unlawful. The object of the members of the association was to free themselves from the competition of those not mem-

bers, which, as we have seen, is not unlawful. The means taken to accomplish that object were the agreement among themselves not to deal with wholesale dealers who sold to those not members of the associations, and the sending of notices to that end to the wholesalers. This, as we have also seen, was not unlawful. Hence it follows that, as the object of the combination between the members of the associations was not unlawful, nor the means adopted for its accomplishment unlawful, there is no ground for the charge of conspiracy, and the fact of combination is wholly immaterial. *Com. v. Hunt*, 4 Metc. (Mass.) 111, 129, 38 Am. Dec. 346; *Bowen v. Matheson*, 14 Allen (Mass.) 499; *Wellington v. Small*, 3 Cush. (Mass.) 145, 150, 50 Am. Dec. 719; *Carew v. Rutherford*, 106 Mass. 1, 14, 8 Am. Rep. 287; *Payne v. Railroad Co.*, 81 Tenn. (13 Lea) 507, 521, 49 Am. Rep. 666; *Hunt v. Simonds*, 19 Mo. 583, 588; *Robertson v. Parks*, 76 Md. 118, 134, 135, 24 Atl. 411; *Steamship Co. v. McGregor* [1892] 23 Q. B. Div. 598, App. Cas. 25; *Manufacturing Co. v. Hollis*, 54 Minn. 223, 234, 55 N. W. 1119, 21 L. R. A. 337, 40 Am. St. Rep. 319; *Delz v. Winfree*, 80 Tex. 400, 404, 16 S. W. 111, 26 Am. St. Rep. 755. We are of the opinion that the bill should be dismissed.

ALFRED W. BOOTH & BRO. v. BURGESS.

(Court of Chancery of New Jersey, 1906. 72 N. J. Eq. 181, 65 Atl. 226.)

STEVENSON, V. C.⁴ Upon the motion papers as they stand, counsel for the complainant applied for an injunction merely to enjoin the maintenance of a boycott. The motion for a wider preliminary injunction indicated by the order to show cause was abandoned.

The complainant is a corporation under the laws of New Jersey, carrying on the business of lumber dealers and manufacturers of doors, blinds, trim, and other millwork used in the erection of buildings. Its customers are boss carpenters and building contractors. It owns its yard and mill, which are situate at Bayonne, in Hudson county, and the value of its plant and stock on hand is over \$200,000. It employs about 25 hands. The defendants against whom a preliminary injunction was prayed for are officers and agents of the labor organizations which embrace the building trades of Hudson county. These trades are organized in the usual way in local unions, a district council composed of delegates from all the local unions in Hudson county, and a united brotherhood composed of all the local unions throughout the United States and Canada belonging to the order, which local unions, however, are represented in the convention or governing body of the united brotherhood by delegates. Consequent upon a dispute as to hours of labor and wages between the complainant and its employes, the complainant "declared the open shop," the employes struck, and

⁴ Portions of the opinion are omitted.

thereupon the complainant became involved in a contest with the whole system of labor unions in Hudson county connected with the building trades, embracing between two and three thousand workmen. The complainant became "unfair," and all its products likewise became "unfair." The labor organizations, through the defendants, their officers and agents, have notified the boss carpenters and builders that the complainant's goods are "unfair" and that members of the unions will not handle them, and that if they receive or use any of this unfair material their employes will be called out, and thus they are confronted with loss, if not ruin, in case they persist in dealing with the complainant. Under this coercion certain boss carpenters have broken their contracts with the complainant under which they were receiving the complainant's goods, and, what is of more consequence, other boss carpenters and builders who had been regular customers of the complainant have been constrained to refrain from using its goods on their jobs, inasmuch as the inevitable result of such use would be that all their employes who are members of these allied labor unions would immediately be called off and forced into a strike.

It is a fact of the utmost importance in my judgment in this case—a fact which I think is absolutely essential to the granting of the most important part of the injunctive relief prayed for by the complainant—that the defendants' scheme for coercing the boss carpenters to conduct their business as they (the defendants) wish to have it conducted, does not involve merely the voluntary action of the employes of the boss carpenters individually or in combination, and the announcement of such voluntary action or intended voluntary action; the scheme includes the coercion by the defendants of the employes of the boss carpenters. These workmen are to be forced to strike against their will whenever the defendants shall say the word. The coercion consists in the fact that if any workman refuses to strike he is liable to a fine, and also to expulsion from his union. Expulsion from the union subjects the victim not only to obloquy but also to pecuniary loss, and makes it more difficult for him to get employment and make his living, as is amply illustrated in this case. It does not appear that the boss carpenters are greatly injured or inconvenienced by being obliged to refrain from dealing with the complainant. It may be inferred that these contractors are able to supply themselves with goods of the class which the complainant manufactures from other sources, and hence they seem to be inclined readily to submit to the coercion of the defendants. Their attitude is precisely the same as that of Mr. Munce in *Quinn v. Leatham*, *infra* [(1901) A. C. 495]. The pecuniary loss from this boycott falls directly upon the complainant, and it is evident that this loss is of such an extent and nature as will warrant the use of the injunctive power of a court of equity, provided such loss is caused by conduct of the defendants which is unlawful.

Upon the filing of the bill and annexed affidavits an order was made

requiring the defendants to show cause why an injunction should not issue according to the prayer of the bill, upon the return of which order the defendants appeared and filed an answer and affidavits. After hearing an elaborate argument by counsel, I advised an order for an injunction restraining the defendants "from calling out or directing to strike any employé or employés of the complainant's customers or persons who were willing to deal with the complainant, with the intent or with the effect to coerce or induce, by fear of loss, such customer or persons willing to deal with the complainant, to break their contracts with the complainant, or to refrain from dealing with the complainant; and also, restraining the defendants from coercing or inducing such employés by fine or expulsion from a labor union, or by threat of such fine or expulsion to refrain from being employed by such customers with the intent or effect aforesaid." An appeal having been taken from this order to the Court of Errors and Appeals, it is necessary that I should set forth the "reasons" of the order. * * *

We now approach the discussion of the facts of the case in hand, and in such discussion we must bear in mind at every stage two principles which I think at the present day are established beyond question. The first of these principles is the absolute right of all men to contract or refrain from contracting, which is one of the rights hereinbefore enumerated. The motives which actuate a man in refraining from making a contract in relation to labor or merchandise or anything else are absolutely beyond all inquiry or challenge. Self-evident as it may be, the proposition, I think, has often been lost sight of that the right to refrain from contracting is an absolute right, which every man can exercise justly or unjustly, for a good purpose or for a bad purpose, "maliciously," in the popular sense of the term, or benevolently. The second principle to keep in view is not at present universally recognized as sound law, viz., that men have an absolute right to act in voluntary combination with respect to contracting or refraining from contracting. No doubt there is authority for the proposition that defendants, by combining with a "malicious" intent to exercise together the right to refrain from contracting, may be guilty of a tort—of a violation of a right held by the party damaged by such combined abstention from contracting. Passing the defect in the formulation of this proposition, I can only repeat, what I attempted to set forth in deciding the case of *Jersey City v. Cassidy* [63 N. J. Eq. 759, 53 Atl. 233], that it seems to me that the settled American doctrine, apart from all recent statutes, is that all dealers in the market, whether in merchandise or in labor, on each side of the market, have an absolute right to combine voluntarily to concurrently exercise their several rights to refrain from contracting if they see fit to do so, however immoral their motives may be. If this is not good law, then the right to refrain from contracting is subject to a most extraordinary limita-

tion which leads to absurd results. It may be worth while to note precisely what a free combination of employers or employes or vendors or purchasers actually do when, for the purposes of a strike or a boycott, they concurrently exercise by agreement their several and respective rights to refrain from contracting. They are not combining, as is sometimes erroneously supposed, to do anything, much less to do the same thing; they are merely agreeing voluntarily that each of them will refrain from doing a certain thing which is precisely similar to another thing which each of the others in like manner will refrain from doing. If they commit any tort, i. e., any actionable wrong, it consists essentially in nonfeasance, not misfeasance—refraining from doing anything, not doing anything. Let us suppose that it is established as law that the combined action of a large number of persons may be so productive of evil as to make these persons civilly liable for a tort which may be defined as a “malicious” or unjustifiable conspiracy to injure one in his business, even though precisely the same harmful conduct pursued to the extent possible by a single individual would not involve him in any liability whatever. This, it seems to me, is substantially the proposition which the judges, or the most of the judges, in *Quinn v. Leatham* [(1901) A. C. 495], considered as underlying one of the causes of action established in that case. The five officers and agents of the labor union were found guilty of conspiring to instruct, i. e., to positively direct, the employes of Mr. Munce to refrain from dealing with him. This was held to be a misfeasance. The five defendants were not charged with combining to refrain from acting or to refrain from doing anything. When, however, we pass to a voluntary combination of Mr. Munce’s employes to refrain from renewing their contracts for service with him, we have a clear case of nonfeasance. It seems to me that there is a very wide distinction between an unlawful conspiracy to do things which each one of the conspirators by himself has an absolute right to do, on the one hand, and an unlawful conspiracy merely to refrain from doing things which no one of the conspirators is under the slightest obligation to do. The moment it is established that one man has an absolute right to refrain from contracting, and that his motives are beyond all challenge, I am entirely unable to perceive how a voluntary agreement between two men that they will severally and at the same time exercise this absolute right can be erected into a tort involving liability for damages. Without for a moment conceding that either of the so-called “conspiracies” above contrasted can constitute a tort, I desire to point out that even if the first-mentioned conspiracy is held to be a tort, in accordance with the views of the judges in *Quinn v. Leatham*, a great extension of the doctrine is necessary before the other conspiracy, the conspiracy of nonfeasance, the conspiracy to refrain from doing, can be adjudged such tort. If dealers in the market who voluntarily combine to refrain from contracting with intent to damage some one

in his business are guilty of a tort, it must be that some or all of them are under an obligation to contract. It seems hardly possible that two or more persons may be liable for damages resulting from their failure to act unless they were legally bound to act. It did not require the judgment of the House of Lords in *Allen v. Flood* [(1898) A. C. 1] to make clear the rule that when men, either singly or in combination, intentionally pursue a line of conduct which they have a right to pursue, the existence of an immoral or a "malicious" motive cannot make such conduct unlawful. * * *

The last question to be considered which is presented by the facts of this case is whether there is any justification shown for the interference with the complainant's market by the coercion exercised upon the employés of the boss carpenters by those defendants or the labor organization which they represent. It may be conceded that the coercion may be justified, and hence may not constitute a violation of any one's right to a free market, precisely as persuasions and inducements may be justified so that they cannot constitute the tort which consists in causing the breach of a contract. The concrete question in this case is whether these employés of the boss carpenters, by voluntarily joining these labor unions and subjecting themselves to the by-laws and regulations of these unions and the control of its officers and agents, deprive the coercion which is exercised upon them of all illegal taint. This is the only question in this case which seemed to me to be open to debate. In the first place, it must be borne in mind that employés of the boss carpenters are not here in court making any complaint. The coercion was exercised upon them, and they may have suffered on that account; but it is not their grievance which is being redressed, in this suit. As we have seen, it is the interest of the complainant in their freedom to deal in the labor market, and not their own interest in their freedom to deal in that market, which this court in this suit is asked to protect. Suppose it be conceded that these employés may surrender their liberty to the arbitrary power of this immense organization and agree that this power can be exercised whenever a business agent of the organization speaks the word; they can only surrender the interest which they themselves have in their liberty. I certainly do not propose to question the lawfulness of fining or expelling, and consequently threatening to fine and expel, members of labor unions who disobey the laws to which they have voluntarily subjected themselves. It is impossible to give the time necessary for an exhaustive discussion of this somewhat novel subject. Let it be conceded for the purposes of this case that labor unions may lay down many rules for the guidance of employers in the conduct of their business, and prohibit by by-laws or otherwise their members from working for employers who disregard those rules. Employers, for instance, who expose their employés to dangerous machinery or unwholesome conditions may find that they cannot readily employ union men, and

union men who, in violation of the by-laws of their unions, engage themselves to such employers, may be exposed to fines or expulsion from their unions. These and other similar cases, the status of which in the eye of the law I do not pause to consider, present the use of the penalties of fine and expulsion for the purpose of advancing the legitimate objects of the union. When, however, the threat of fine and expulsion is employed for the purpose of coercing the employes of a large number of different employers to refrain from renewing their contracts for labor in order to coerce all these employers to boycott the complainant, with the ultimate object of coercing the complainant in respect of a matter with which the employes who are first coerced have absolutely no concern whatever, then it seems to me the whole scheme becomes an attack upon the complainant's right to a free market. No surrender of liberty or voluntary agreement to abide by by-laws on the part of the employes who are first coerced, made by them when they enter their labor unions, can in my judgment affect the right of the complainant to a free market, which right he will enjoy for all it may be worth if these employes are permitted to exercise their liberty. The employes may be able to surrender their own right, but they certainly cannot surrender the right of other parties. *Boutwell v. Marr*, supra [71 Vt. 1, 42 Atl. 607, 43 L. R. A. 803, 76 Am. St. Rep. 746], and *Berry v. Donovan*, supra [188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738], I think fully sustain the view that no justification has been shown in this case. If 2,500 workmen in Hudson county could, by permitting themselves to be organized into labor unions, surrender not only their own right to freedom in respect of making contracts, but also destroy the interest of all other dealers in that freedom, the whole foundation of the right to a free market would be swept away. * * *

The views which I have suggested in regard to the case of *Quinn v. Leatham* and the opinions of the judges delivered in deciding that case may be summed up as follows:

First. The right of the plaintiff which was vindicated was the right to a free market, and it was, as I have just stated, quite unnecessary to assert on the plaintiff's behalf the right to be protected against a conspiracy to damage his business, unless the conduct of the defendants complained of might have been pursued with impunity by a single defendant. The invasion of the plaintiff's right—the tort of the defendants—consisted in the coercion exercised by them on the plaintiff's customer *Munce* by threat to coerce *Munce's* employes into a strike. This tort, as Lord Lindley shows, might be committed by a single defendant.

Second. If the employes of *Munce* had voluntarily combined to coerce him to refrain from dealing with the plaintiff by merely exercising their absolute right to refrain from contracting further with him (*Munce*) unless their demands were complied with, then those

employés would have been guilty of no tort recognized by our American law, and no inquiry into their motives would be allowed.

Third. Whether a plaintiff who has been damaged in his business in a case like *Quinn v. Leatham* by coercion of his customers, effected by causing or threatening to cause the employés of such customers to strike by mere persuasions, payment of money, or any other non-coercive inducement, has a cause of action against the person or persons who have so caused such damage, is a question not raised in this present case. When such a case is presented, it seems to me that the question of conspiracy, i. e., the significance of a combination of two or more defendants, will come up only after it has been determined that the plaintiff had no right to natural market conditions as against unjustifiable interference by outside parties exercising the noncoercive inducement.

Fourth. If in these strike and boycott cases the element of a conspiracy is to be found, it would seem that there must be a combination among the defendants which brings to bear upon the plaintiff an aggregation of evil minds. This notion lay at the basis of the common-law crime of conspiracy. One man might resolve to cause and undertake to cause some damage to another without incurring criminal or civil liability, but, if two or more men combined to do the same thing, their conduct became oppressive. The increase of power from an aggregation of evil minds and wills constitutes the gist of the criminal offense of conspiracy.

Several of the English judges in these recent strike and boycott cases have intimated the opinion that for the same reason which sustained the criminal offense of conspiracy a combination of defendants in a case like *Quinn v. Leatham*, actuated by bad motives and causing damage to the plaintiff, constitutes a tort and creates civil liability, the combined action of two or more persons being an essential element of such tort. This reasoning may apply correctly to the voluntary combination of employés or employers, vendors or purchasers, acting together with intent to damage the plaintiff, and in fact causing such damage. In this case, however, notwithstanding the rule which, according to Lord Watson, had been "generally accepted" in the inferior English courts, and notwithstanding what Lord Chancellor Halsbury and other judges said in *Quinn v. Leatham*, I feel quite sure that the accepted American view sustains the absolute right of the combined body of employés or other dealers to refrain from contracting as they may see fit, however wicked or "malicious" their motives may be. But in all these cases of voluntary combinations of dealers we have presented one essential element of a conspiracy, viz., an enormous increase of power for evil arising from an aggregation or combination of evil minds. But in cases like *Quinn v. Leatham*, as Lord Lindley has distinctly pointed out, the fact that the party defendant consists of two or more persons is a mere accident. It is

true that in *Quinn v. Leatham* the power for evil resulted from a combination, but this combination was not that of the two or more defendants. The oppression and coercion resulting from the combined action of Munce's employes was the result of coercion upon them which required no combination in order to its exercise in the most complete degree. The employes of Munce whose coerced combination was the menace which constrained him to refrain from dealing with the plaintiff were not conspirators voluntarily and willfully uniting their several evil minds to oppress the plaintiff; on the contrary, they were victims. In the case before this court the employes of the boss carpenters are not conspirators willfully combining to do damage which each of them severally would be powerless to effect. It is, as I have undertaken to show, an essential element of the defendant's tort in this case that they coerce the employes of these carpenters to refrain from further contracting with their employers. The moment it appears that these unfortunate employes are willful conspirators the whole foundation of the plaintiff's claim that his right to a free market has been violated immediately disappears.

For the reasons indicated, it seems to me inadvisable to base the liability of the party defendant in cases like *Quinn v. Leatham* and the present case, when such party defendant happens to consist of more than one person, upon any theory of conspiracy. In the foregoing discussion no distinction has been drawn between coercion of a single dealer or customer in the market and coercion of a large number of dealers or customers. As a matter of fact, in these boycott cases we have presented in every instance coercion of a number of dealers or a class of dealers, and it is this sort of coercion of which the plaintiff complains. The tort in cases like *Quinn v. Leatham* and the present case consists essentially in the creation by coercion of an involuntary combination, but the persons in combination are not conspirators and are not made defendants in the suit. The party defendant, whether a single person or two persons, or ten persons, should, I think, plainly be regarded as a unit.

III. Existing Contracts of Employment⁵

BEEKMAN v. MARSTERS.

(Supreme Judicial Court of Massachusetts, 1907. 195 Mass. 205, 80 N. E. 817, 11 L. R. A. [N. S.] 201, 122 Am. St. Rep. 232, 11 Ann. Cas. 332.)

Bill by Gabriel E. Beekman against George E. Marsters for an injunction. Reserved by single justice for the determination of the Supreme Judicial Court. Injunction granted.

⁵ For the discussion of principles, see Chapin on Torts, § 93.

LORING, J.* This suit came before the single justice on the report of a master to which no exceptions had been taken by either party, and was reserved by him for our consideration and determination without any ruling or decision having been made.

The master found that on November 21, 1906, a contract was made between the plaintiff and the Jamestown Hotel Corporation. The Jamestown Hotel Corporation is a corporation which is erecting or has erected a hotel within the grounds of the Jamestown Exposition to be held between April 26th and November 30th of this year. This hotel is known as the "Inside Inn," and is to be the only hotel within the exposition grounds. The plaintiff is the proprietor of a tourist agency, having an office at 293 Washington street, Boston. By the contract between the plaintiff and the hotel corporation the plaintiff agreed to represent the hotel corporation throughout the New England states, to establish subagencies in that territory, and to use every possible endeavor personally and through his agents to book persons for the Inside Inn; and the defendant agreed "that you [the plaintiff] shall be our exclusive agent in said territory," to pay him (the plaintiff) 25 cents a day for each person sent by him to the hotel, and to furnish the plaintiff with all necessary "literature."

Immediately upon being thus appointed the exclusive agent of the hotel corporation the plaintiff prepared and issued a fall edition of his "Tickets and Tours," in which inter alia a description is given of the Jamestown Exposition and of the Inside Inn. Following this is the statement that the plaintiff has been appointed New England agent for the exposition "and exclusive representative of the Inside Inn."

The defendant is found by the master to be a ticket and tourist agent, with an office at 298 Washington street, Boston. On January 11, 1907, he went to Norfolk, Va., and called upon the officers of the hotel corporation there. At this time he "had seen the contract between the complainant and the hotel corporation, but had not read it, and knew that the company had practically consummated a contract making Beekman its sole representative in New England." The defendant at this interview told these officers "that it was a mistake for the corporation to give an exclusive agency in New England to any one man, and that more business would be brought to the company if all agents were given equal terms," and to enforce his arguments stated that the business done by the plaintiff was insignificant and that the statement was false which was made in the summer edition of his "Tickets and Tours" that certain persons therein named had his tickets and tours for sale. It appeared that the summer edition of this catalogue had been shown to the hotel corporation by the plaintiff when he made his contract with it.

The master found that "as a result of the solicitations or representations made by the respondent, the Jamestown Hotel Corporation on

* Portions of the opinion are omitted.

or about January 11, 1907, entered into an oral contract with him, whereby it was agreed that the respondent should have the same rights that had been given to the complainant, and that he should be paid by the corporation 25 cents per capita per day for each guest whom he should secure for the Inside Inn."

The defendant then wrote to all men named in the plaintiff's catalogue except those having places of business in Canada, "and two or three others who appeared to have an independent agency business," telling them that the plaintiff had not an exclusive agency for New England and suggesting to them that they could get paid on the same footing as that upon which the plaintiff and defendant were to be paid, if they chose to act for themselves and not as subagents of the plaintiff. He also wrote to the New York, New Haven & Hartford Railroad Company, calling attention to the fact that some of the local ticket agents of that railroad company were advertised by the plaintiff as having his tickets and tours on sale, and suggesting that the railroad company would prefer to have all its agents strictly neutral in dealing with tourist concerns.

* * * The result of the findings of the master must be taken to be that the defendant induced the hotel corporation to break its contract with the plaintiff, but that it did not do this to spite the plaintiff or for the purpose of injuring him, but for the purpose of getting for himself (the defendant) business which the plaintiff alone was entitled to under the contract with the hotel corporation, that is to say, to get business which the defendant could not get if the hotel corporation kept its agreement with the plaintiff.

Three defenses have been set up by the defendant, namely: First, that he had a right to do what he did; second, that the plaintiff does not come into court with clean hands; and, third, that the plaintiff has an adequate remedy at law by bringing an action for damages.

1. So far as the first defense is concerned, it is in effect that where A. is under a contract to serve the plaintiff for a specified time, the defendant, knowing that contract to be in existence, is justified in hiring A. away from the plaintiff before the expiration of that time, by giving him (A.) higher wages if he (the defendant) thinks that to be for his (the defendant's) pecuniary benefit. The ground on which the defendant bases this contention is that he has a right to compete with the plaintiff and that the right of competition is a justification for thus hiring away the plaintiff's servant.

We say that this is in effect the defense set up here because it has been settled in Massachusetts that there is no distinction between a defendant's enticing away the plaintiff's servant and a defendant's inducing a third person to break any other contract between him and the plaintiff. That was decided by this court in *Walker v. Cronin*, 107 Mass. 555. See page 567. See, also, *Moran v. Dunphy*, 177 Mass. 485, 59 N. E. 125, 52 L. R. A. 115, 83 Am. St. Rep. 289. In

other words, this court there adopted the conclusion reached by the majority of the judges of the Queen's Bench in *Lumley v. Gye*, 2 El. & Bl. 216. This is also the settled law of the Supreme Court of the United States. *Angle v. Chicago, St. Paul, etc., Ry.*, 151 U. S. 1, 14 Sup. Ct. 240, 38 L. Ed. 55. And it has been affirmed in England. *Bowen v. Hall*, 6 Q. B. D. 333; *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88; *Glamorgan Coal Co., Limited, v. South Wales Miners' Federation*, [1903] 2 K. B. 545; s. c. on appeal, sub nomine *South Wales Miners' Federation v. Glamorgan Coal Co., Limited*, [1905] A. C. 239.

No case has been cited which holds that a right to compete justifies a defendant in intentionally inducing a third person to take away from the plaintiff his contractual rights.

Not only has no case been cited in which that has been held, but no case has been cited in which that contention has been put forward.

It happens, however, that Judge Wells in defining the rights of competition has denied the existence of such a justification. In discussing the first count in *Walker v. Cronin*, 107 Mass. 555, 564, he said: "Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss come as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with." And it also happens that in *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88, Darling, J., in discussing the rights of a labor union to induce the plaintiff's employers to break their contract of apprenticeship with him, denied it. He there said: "To resume, I think the plaintiff has a cause of action against the defendants, unless the court is satisfied that, when they interfered with the contractual rights of plaintiff, the defendants had a sufficient justification for their interference—to use Lord Macnaghten's words. 'This sufficient justification they may have had, and they may prove it; but the facts found by the county court judge and relied on by him as enough do not amount to one; for it is not a justification that 'they acted bona fide in the best interests of the society of masons,' i. e., in their own interests. Nor is it enough that 'they were not actuated by improper motives.' I think their sufficient justification for interference with plaintiff's right must be an equal or superior right in themselves, and that no one can legally excuse himself to a man, of whose contract he has procured the breach, on the ground that he acted on a wrong understanding of his own rights, or without malice, or bona fide, or in the best interests of himself, nor even that he acted as an altruist, seeking only the good of another and careless of his own advantage."

It is hard to see how this court could have decided *Garst v. Charles*,

187 Mass. 144, 72 N. E. 839, as it did were it the law that self-interest is a justification for intentionally interfering with a plaintiff's contractual rights. The same is true of *Bowen v. Hall*, 6 Q. B. D. 333, if not of *Read v. Friendly Society of Operative Stonemasons*, [1902] 2 K. B. 88.

The argument here urged by the defendant comes from not distinguishing between two cases which not only are not the same, but are altogether different so far as the question now under consideration is concerned.

If a defendant by an offer of higher wages induces a laborer who is not under contract to enter his (the defendant's) employ in place of the plaintiff's, the plaintiff is not injured in his legal rights. But it is a quite different thing if the laborer was under a contract with the plaintiff for a period which had not expired, and the defendant, knowing that, intentionally induced the laborer to leave the plaintiff's employ by an offer of higher wages, to get his (the laborer's) services for his (the defendant's) benefit.

A plaintiff's right to carry on business, that is, to make contracts without interference, is an altogether different right from that of being protected from interference with his rights under a contract already made. The existence of both rights and the difference between the two is recognized by *Wells, J.*, in *Walker v. Cronin*, 107 Mass. 555; the first count in that case went on the first right, and the second and third counts on the second right. Again, the existence of the two is recognized and stated by *Holmes, J.*, in *May v. Wood*, 172 Mass. 11, 14, 15, 51 N. E. 191.

Where the plaintiff comes into court to get protection from interference with his right of possible contracts, that is, of his right to pursue his business, acts of interference are justified when done by a defendant for the purpose of furthering his (the defendant's) interests as a competitor. It was this right that the plaintiff came into court to assert in *Carew v. Rutherford*, 106 Mass. 1, 8 Am. Rep. 287; *Walker v. Cronin*, 107 Mass. 555 (so far as the first count was concerned); *G. Vegelahn v. Guntner*, 167 Mass. 92, 44 N. E. 1077, 35 L. R. A. 722, 57 Am. St. Rep. 443; *Plant v. Wood*, 176 Mass. 492, 57 N. E. 1011, 51 L. R. A. 339, 79 Am. St. Rep. 330; *Martell v. White*, 185 Mass. 255, 69 N. E. 1085, 64 L. R. A. 260, 102 Am. St. Rep. 341; *Berry v. Donovan*, 188 Mass. 353, 74 N. E. 603, 5 L. R. A. (N. S.) 899, 108 Am. St. Rep. 499, 3 Ann. Cas. 738, and *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 (so far as the third prayer for relief was concerned).

The cases of *Walker v. Cronin*, 107 Mass. 555 (so far as the second and third counts were concerned), *May v. Wood*, 172 Mass. 11, 51 N. E. 191, *Garst v. Charles*, 187 Mass. 144, 72 N. E. 839, and *Pickett v. Walsh*, 192 Mass. 572, 78 N. E. 753, 6 L. R. A. (N. S.) 1067, 116 Am. St. Rep. 272, 7 Ann. Cas. 638 (so far as the second prayer for relief was concerned), are cases of the second class.

There are statements in opinions in Massachusetts and in England that a defendant is not liable for interference with a plaintiff's rights in both of these two classes of cases unless he acts maliciously. Within the meaning of malice as used in these opinions in the case at bar there was no necessity of proving spite or ill will toward the plaintiff. This is not a case where there was an abuse of what, if done in good faith, would have been a justification, but a case where the defendant with knowledge of the contract between the plaintiff and the hotel corporation intentionally and without justification induced the hotel corporation to break it. That is proof of malice within the meaning of that word as used in these opinions. *South Wales Miners' Federation v. Glamorgan Coal Co., Limited*, [1905] A. C. 239. * * *

The terms of the injunction should be in substance that the defendant be restrained from directly or indirectly acting as agent of the hotel corporation within the New England states, and from preventing or seeking to prevent, directly or indirectly, the plaintiff from acting as exclusive agent of the hotel corporation for that territory.

So ordered.

IV. Existing Contracts not of Employment [†]

BOYSON v. THORN.

(Supreme Court of California, 1893. 98 Cal. 578, 33 Pac. 492, 21 L. R. A. 233.)

HAYNES, C. Defendant demurred to plaintiff's complaint, the demurrer was sustained, and judgment was thereupon rendered dismissing the action, from which judgment the plaintiff appeals.

The complaint alleges that Frank G. Newlands is the owner and in possession and control of the Palace Hotel in the city of San Francisco, and of a public restaurant attached thereto, and conducted the same as a hotel and restaurant, and that the defendant, during all the times mentioned in the complaint, was the agent of Newlands, and as such had charge of the business thereof, and direction of the servants therein. That immediately prior to November 1, 1889, Newlands entered into an agreement whereby plaintiff hired certain rooms in said hotel, as lodgings for himself and wife from November 1, 1889, at the monthly rent of \$100; that they were to have their meals at said restaurant, or furnished from said restaurant to their said rooms, he paying therefor the usual rates; that they entered and occupied the rooms, and in all things complied with said agreement, but that on December 5, 1889, the "defendant maliciously, and with intent to oppress, annoy, and disturb plaintiff in the occupancy of his lodgings, and to force him to abandon the same, and to deprive him of the com-

[†] For discussion of principles, see Chapin on Torts, § 94.

forts and conveniences which he was then and there enjoying, and to injure him in his profession, and to degrade and belittle him in the eyes of the guests of said hotel and of his friends and of the public in general, and in fraud of said agreement, caused and procured F. G. Newlands then and there to demand that plaintiff and his wife forthwith vacate said lodgings." It is further charged that defendant maliciously caused and procured Newlands to refuse to furnish meals, etc., and to instruct the servants to refuse their orders; and that on December 12, 1889, defendant maliciously caused and procured Newlands to threaten and attempt to forcibly eject plaintiff and his wife from said rooms, whereby his wife became ill, and he was compelled to and did employ a nurse at an expense of \$60, and also to hire men to protect his wife and retain possession, etc., at a further expense of \$60, and prays for \$25,120 damages. The action is against Thorn alone. The demurrer is that the facts stated do not constitute a cause of action against the defendant.

The broad question presented is whether an action will lie against one who, from malicious motives, but without threats, violence, fraud, falsehood, deception, or benefit to himself, induces another to violate his contract with the plaintiff. We state the question thus because it will be observed that the complaint does not state the means used to cause or procure Newlands to violate his contract with the plaintiff, but only that it was done "maliciously." The general rule is that only those who are parties to, or in some manner bound by, a contract, are liable for a breach of it. To this general rule there are certain exceptions, as, for example, contracts for personal services involving the relation of master and servant; and there are also other cases that are sometimes classed as exceptions, but which are not strictly so. In *Cooley on Torts* (2d Ed., p. 581) it is said: "An action cannot, in general, be maintained for inducing a third person to break his contract with the plaintiff, the consequence, after all, being only a broken contract, for which the party to the contract may have his remedy by suing upon it. But if the third person was induced to break his contract by deception it may be different. If, for example, one were to personate a vendee of goods, and receive and pay for them as on a sale to himself, the vendee would have his action against the vendor; but he might also pursue the party who, by deceiving one, had defrauded both." In the case supposed by the learned author the gist of the action is the fraud of the defendant in personating the vendee. The fact that the only injury or damage sustained by the vendee in consequence of defendant's fraud was the loss of the benefit he would have derived from the performance of the contract does not at all change the character of the action. Suppose that A., knowing that B. is about to bestow upon C., as a gratuity, a large amount of money or property, and A. fraudulently personates C., and receives the money or property, C. could have no action against B., for there was no con-

tract relation between them; but C. could have his action against A. for the loss caused by his fraud. The means used to accomplish the wrong is in each case the same, showing conclusively that the fraud is the basis of the action, while the breach of the contract thus procured goes only to the question of damages; that is, how and in what manner and to what extent has the plaintiff been injured by the fraud, deceit, or other wrongful act of the defendant? *Rice v. Manley*, 66 N. Y. 82, 23 Am. Rep. 30, cited by appellant, is another illustration. There the plaintiffs had contracted verbally with Stebbins for the purchase of a large quantity of cheese. The defendant, Manley, procured a telegram to be sent to Stebbins in the name of E. Rice, falsely saying that plaintiffs did not want the cheese, and thereby induced Stebbins, who supposed E. Rice was one of the plaintiffs, to sell the cheese to Manley. Stebbins was not bound by the verbal contract, but it is found that he would have performed it but for the fraud of defendant. The action was sustained. *Benton v. Pratt*, 2 Wend. (N. Y.) 385, 20 Am. Dec. 623, also cited by appellant, was another case where a contract with the plaintiff was broken because of defendant's false representation that plaintiff had abandoned all intention of fulfilling it. *Lally v. Cantwell*, 30 Mo. App. 524, also cited by appellant, was an action for loss of employment. The court, after discussing the cases involving the relation of master and servant, said: "But this case falls within another well-settled principle, which is that, where the interference takes the form of false, defamatory statements—of libel or slander—an action will lie for interference with a relation beneficial to the plaintiff, although the relation did not rest in contract, and although the breach of it by the party who was procured to break it was not actionable." The cases are too numerous to be cited or reviewed where interference with business or contract relations through acts of violence, nuisance, threats, deceit, fraud, libel, and slander have been redressed, both in England and in this country. Most of the cases cited by appellant, which do not involve the relation of master and servant, will be found of the character above mentioned, though in many of both classes will be found expressions which more or less directly support the proposition for which appellant contends.

Cases involving the relation of master and servant, though that relation is now created solely by contract, seem to stand upon different grounds from contracts not involving that relation. Section 49 of the Civil Code, entitled "Protection to Personal Relations," is as follows: "The rights of personal relation forbid (1) the abduction of a husband from his wife, or of a parent from his child; (2) the abduction of a wife from her husband, or of a child from a parent or guardian entitled to its custody, or of a servant from his master; (3) the seduction of a wife, daughter, orphan, sister, or servant; (4) any injury to a servant, which affects his ability to serve his master." In this state, at least, no analogy favorable to appellant can be drawn from cases involving what the Code itself declares to be "a personal relation"

existing between master and servant. The Code does not distinguish between different means which may be employed to disturb or destroy any of these relations, for it is the direct interference with the relation which is forbidden, whether the relation be one founded in natural right, as parent and child, or created by the law, as guardian and ward, or by personal contract, as between master and servant; and therefore does not depend upon the mode or means in or by which the relation may be created. It is not the mere procuring of one party to a contract to break his contract, but it is the taking away from or depriving the master of the subject of the contract, or that which the master contracted for, viz. the services of the servant.

The facts alleged in the complaint do not bring the case within the principle governing cases involving the relation of master and servant, nor of those other cases where a contract is procured to be broken by fraud, deceit, slander, or other actionable wrong, as in *Rice v. Manley*, and other cases above noticed. It is conceded by appellant, and it is unquestionably true, that "one may advise a friend in all honesty, and without ill will to the other contracting party, to abide the risks of breaking an onerous or mischievous contract, rather than those of performing it." In *Bowen v. Hall*, 6 Q. B. Div. 343, Brett, L. J., said: "Merely to persuade a person to break his contract may not be wrongful in law or in fact." This being true, will the fact that the advice or persuasion proceeds from malicious motives create a liability where the same advice or persuasion, if given from good motives, would not? In considering this question the distinction between civil and criminal proceedings must not be overlooked. In the dissenting opinion of Lord Coleridge, C. J., in *Bowen v. Hall*, supra, the question above presented is answered thus: "It is, I believe, also admitted, except by Sir William Erle, whom I think no one has ever followed, that if a man endeavors to persuade another to break his contract, and succeeds in his endeavor, yet if he does this without what the law calls 'malice,' the damage which results, however great, is not in itself a cause of action against him. But if the damage which is not in itself actionable be joined to a motive which is not in itself actionable, the two together form a cause of action. This seems a strange conclusion. * * * I do not know, except in the case of *Lumley v. Gye*, 2 El. & Bl. 216, that it has ever been held that the same person, for doing the same thing, under the same circumstances, with the same result, is actionable or not actionable, according to whether his inward motive was selfish or unselfish, for what he did. I think the inquiries to which this view of the law would lead are dangerous and inexpedient inquiries for courts of justice. Judges are not very fit for them, and juries are very unfit."

It is a truism of the law that an act which does not amount to a legal injury cannot be actionable because it is done with a bad intent; that what one has a right to do another cannot complain of. It is conceded that one may lawfully persuade or procure another to break

his contract with a third person, "if it be done from good motives." We think the qualification has no place in the proposition. If it is right, and the means used to procure the breach are right, the motive cannot make it a wrong any more than a good motive would justify fraud, deceit, slander, or violence to effect the same purpose. Suppose A. by fraudulent representations induces B. to sell him a large quantity of goods upon credit, intending to defraud B. of the entire value of the goods. C., knowing that the representations are false, and not caring whether B. shall lose his goods or not, but of unmixed malice and ill will towards A., procures B. to refuse to deliver the goods, by truthfully informing B. of the falsity of the representations made by A. Will it be said that C. is liable in an action brought by A.? In Cooley on Torts (2d Ed., p. 832) the learned author says: "Bad motive, by itself, then, is no tort. Malicious motives make a bad act worse, but they cannot make that a wrong which in its own essence is lawful. When in legal pleadings the defendant is charged with having wrongfully done the act complained of, the words are only words of vituperation, and amount to nothing unless a cause of action is otherwise alleged." Again, the same author (at page 836) says: "Motive generally becomes important only when the damages for a wrong are to be estimated. It then comes in as an element of mitigation or aggravation, and is of the highest importance." That the mere fact that one induces another to break a contract with a third person does not give a right of action, seems to have been directly decided in *McCann v. Wolff*, 28 Mo. App. 447, cited by appellant. The petition alleged that "by some means unknown to plaintiff" the defendant induced a third person to recede from a contract, whereby the plaintiff lost commissions. The court said: "The demurrer was properly sustained. The petition charges neither malice nor fraud on defendant's part, and in the absence of both an action of this kind is not maintainable."

Lumley v. Gye, 2 El. & Bl. 216; *Bowen v. Hall*, 6 Q. B. Div. 333; and *Walker v. Cronin*, 107 Mass. 555—are cited and largely relied upon by appellant. In *Lumley v. Gye*, plaintiff, the proprietor of a theater, employed Miss Wagner to sing in his theater for a specified time. Defendant, knowing the premises, and maliciously intending to injure the plaintiff, enticed and procured Wagner to refuse to perform, by means of which enticement and procurement she wrongfully refused to perform, etc. Defendant demurred to the declaration. The court held that the relation of master and servant existed, and the decision was placed upon that ground; Crampton, J., saying, however, that he did not wish to be considered as deciding "or as saying that in no case except that of master and servant is an action maintained for maliciously inducing another to break his contract to the injury of the person with whom such contract has been made." Mr. Justice Coleridge (now lord chief justice of England) dissented in a long and able opinion, holding that the relation of master and servant did not exist within the intent of the statute of laborers of 23 Edw. III., in which

he said the law in relation to the seduction of servants had its origin; and as to the broader proposition argued by counsel and referred to by Crompton, J., concluded: "Merely to induce or procure a free contracting party to break his covenant, whether done maliciously or not, to the damage of another, for the reason I have stated, is not actionable." In *Bowen v. Hall*, supra, a contract for skilled labor, the case was decided in the appellate court upon the authority of *Lumley v. Gye*, Lord Coleridge again dissenting. The opinions of the majority of the court go far to sustain the broad proposition contended for by the appellant here. *Lumley v. Gye* was declared by Lord Coleridge, in the latter case, to stand alone. The reasoning in the dissenting opinions in those cases seems conclusive and satisfactory. *Walker v. Cronin*, supra, was also a case of enticement of laborers. The question arose upon demurrer. The court held, after stating the declaration: "This sets forth sufficiently (1) intentional and willful acts; (2) calculated to cause damage to the plaintiffs in their lawful business; (3) done with the unlawful purpose to cause such damage and loss, without right or justifiable cause on the part of the defendant, which constitutes malice; and (4) actual damage and loss resulting." This case does not seem to be based upon the relation of master and servant, or that of a contract for personal services; but, unless it can be sustained upon that ground (a point not necessary to consider), the decision is clearly wrong. In *Payne v. Railroad Co.*, 13 Lea (Tenn.) 507, 49 Am. Rep. 666, plaintiff, a merchant, had a large and profitable trade with defendant's employes. Defendant circulated a notice to the effect that any of its employes who, after that date, traded with plaintiff, would be discharged. This, it is alleged, was done maliciously, whereby plaintiff was damaged. The court held that an act not unlawful, done in a manner not unlawful, though from wicked and malicious motives, and causing injury, is not actionable. That no contract existed between the merchant and the employes does not affect the principle involved. 2 Greenl. Ev. § 453, defines a malicious act: "In a legal sense, any unlawful act, done willfully and purposely to the injury of another, is, as against that person, malicious."

Two cases recently decided by the supreme court of Kentucky fully sustain our conclusion. *Bourlier v. Macauley*, 91 Ky. 135, 15 S. W. 60, 11 L. R. A. 550, 34 Am. St. Rep. 171, was a stronger case than *Lumley v. Gye*, as the dramatic performer was not only induced to violate her agreement with plaintiff, but to perform in defendant's theater instead. It was held that defendant was not liable. The other case—*Chambers v. Baldwin*, 91 Ky. 121, 15 S. W. 57, 11 L. R. A. 545, 34 Am. St. Rep. 165—was for procuring a third party to break his contract for the sale of a crop of tobacco. The complaint was demurred to. The questions presented, as stated by the court, are: "First, whether one party to a contract can maintain an action against a person who has maliciously advised and procured the other party to break it; second, whether an act lawful in itself can become action-

able solely because it was done maliciously." The judgment of the court below sustaining the demurrer was affirmed. *Jones v. Stanly*, 76 N. C. 355, cited by appellant, directly sustains appellant's contention, but the decision is based upon *Haskins v. Royster*, 70 N. C. 601, 16 Am. Rep. 780 (the only case cited), which case involved the relation of master and servant, and was decided by a divided court. It may be questioned whether the omission to allege that Thorn knew of the contract between appellant and Newlands is not fatal to the complaint, but, as we conclude that the demurrer was properly sustained upon the principal point made, it is not necessary to consider it. We are of the opinion that the judgment appealed from should be affirmed.

We concur: TEMPLE, C.; SEARLS, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

INTERFERENCE WITH DOMESTIC RELATIONS

I. Injuries to Husband¹

BOLAND v. STANLEY.

(Supreme Court of Arkansas, 1909. 88 Ark. 562, 115 S. W. 163, 129 Am. St. Rep. 114.)

Action by R. J. Stanley against J. T. Boland and W. H. Robinson. Judgment for plaintiff, and defendants appeal.

The appellee sued appellants, alleging: "That Era Stanley is and at all the times hereinafter mentioned was the wife of this plaintiff. That on or about the 7th day of November, 1906, while the plaintiff was living, cohabiting with, and supporting her at Winthrop, and while they were living together happily as man and wife, the defendants, wrongfully contriving and intending to injure the plaintiff and to deprive him of her comfort, society, and assistance, maliciously, willfully, and wickedly induced her away from the plaintiff's and her then residence in the town of Winthrop, in Little River county, Ark., and, after so inducing her away from her and plaintiff's residence, forcibly seized her, and by force carried her to the residence of the defendant, J. T. Boland, in Little River county, and have ever since said date forcibly detained plaintiff's said wife and harbored her against the consent of this plaintiff, and have alienated the affection of plaintiff's said wife from him, and caused her to become dissatisfied with her married state. That, by reason of said acts, the plaintiff has been and still is wrongfully deprived by the defendants of the comfort, society, and aid of his said wife, and has suffered great distress of both mind and body in consequence thereof, and great discomfort, inconvenience, and anxiety and will continue to so suffer all to his damage in the sum of \$10,000. And the plaintiff says that, by reason of said willful, malicious, and wicked acts, this plaintiff is entitled to \$10,000 as exemplary or punitive damages against said defendants."

The answer of appellants denied all the material allegations of the complaint, and set up that plaintiff's wife of her own free will and accord left plaintiff on the 7th day of November, 1906, and came to her father's house, J. T. Boland, where she has since resided and made her home, and that no one has persuaded her or induced plaintiff's wife to live separate and apart from him, and that no one has alienated or attempted to alienate her affections from him.

The evidence on behalf of appellee tended to show that appellee on

¹ For discussion of principles, see Chapin on Torts, §§ 95-98.

the 4th of November, 1906, married Era Boland, the daughter of appellant J. T. Boland. Appellee married at his father's house about 11 o'clock Sunday night. He remained with his wife at his father's house for a few days. The next day after the marriage he and his wife went to one Grider's, a neighbor. While there appellant, Boland, came and said to his daughter: "Era, I have come to bring you a letter from your dear old father, the last one you will ever get from him. You are laughing on one side of your face to-day, but you will be laughing on the other side to-morrow." He gave the letter to his daughter, and said to appellee: "Young man, don't say anything to me, don't say a word. I could eat three like you before night." He remained about five minutes. After he left, appellee read the letter. Its contents were as follows: "Era you have played hell with your ducks. You are laughing on one side of your face to-day, but you will be laughing on the other side to-morrow. I don't want you to ever come inside of my yard again, not even in sickness or death. Don't you ever speak to your sisters or your brothers again. You have disgraced yourself, and you are no more your father's child." The day after the marriage appellant Robinson went to a near neighbor of Boland, and asked him what he thought of Era's marriage, and said something about Miss Era disgracing herself by taking Stanley. He said Mr. Boland would try to get her back, and that he was going to do all he could to help him. Robinson often went to Boland's house. They were musicians, and made music together. Robinson was at Boland's house Tuesday night after the marriage. Wednesday morning he went back to Boland's. Robinson and Boland's wife, oldest daughter, and little boy went in Boland's wagon over to Stanley's where appellee lived. Boland was at home when they left to go to Stanley's, and he was there when they returned. When they reached Stanley's, they stopped the wagon at the gate about 50 yards from Stanley's house. Robinson went into the house, and told appellee's wife that her mother was out there and wanted to see her. Mrs. Stanley went out to the wagon, and talked to her mother and sister and Mr. Robinson. Then they carried her back into the house. Robinson had her by one arm and her sister by the other. Robinson was holding her up. When she got into the house, she lay on the bed, crying. Her mother and sister gathered up her things in the house. Then Robinson raised her up off the bed, and took her off. They took her by the arms and led her out to the wagon. She got in the wagon. When Robinson took her up to carry her to the wagon, she did not resist in any way, or act like she did not want to go. She sat on the back seat in the wagon between her mother and sister. The little brother and Robinson sat on the front seat, and drove the wagon. Just as the wagon was leaving, Stanley came up. They met him 15 or 20 steps from the gate. As they drove away, Stanley's wife hollered back to him, and said she was going home to get her things.

A witness who saw them pass the house in the wagon going towards Boland's stated that Mrs. Stanley looked like she had been crying; that her appearance, conduct, and words indicated that she was sad and dejected. The appellee testified that his wife lived with him from Sunday night when they were married till Wednesday when they came and took her away; that she seemed to be as happy as she could be. She was that way Wednesday morning when he left home for his work making ties. They had talked about keeping house on Tuesday night, and the next day he was going to get a housekeeping outfit and move to themselves. He returned from his work Wednesday morning between 11 and 12 o'clock, and saw, as he came up, his wife going off in the wagon with Robinson and the Boland folks. He understood from what she said to him as they drove off that she was going home after her things. When he went into the house, he found that the few things she had there were gone. Then he first discovered that she was leaving him. He went to a neighbor's, and asked him to go over there. He did not get her to come back. He did not go over to Boland's himself, because he was warned several times not to go over there. He tried several times to get some one to go with him, but they would not go. He had not seen his wife since that time to speak to her, had seen her with her father and sisters, but never alone. Appellee was 20 years old when he married. He loved his wife, and he says she seemed to love him. He sent some of his relations over to Boland's to get his wife to come back. He wanted to talk to his wife after she left, but could not get the chance.

On behalf of appellants, appellant Boland testified that he had done nothing to induce the wife of Stanley to return to his, Boland's, house, or to induce her to stay there. After his daughter ran away, he went up there and gave her a letter, and talked to her, and told her never to come back home any more, and told her, under no circumstances, would he ever forgive her for doing like she did. He never spoke to her about coming home at any time. Since she came home "she had been just like she always was, occupied the same room, and everything just like she was before." When he saw his daughter return, he was surprised. "It was like a clap of thunder from a clear sky." "She came back home on her own consent." The young man, Stanley, had never said anything to him about the girl coming back.

WOOD, J.² * * * The loss of what is termed in law "consortium"—that is, the society, companionship, conjugal affections, fellowship, and assistance of the wife—is the principal basis for actions of this kind. Tiffany's *Persons and Domestic Relations*, p. 75, and authorities cited in note; 15 A. & E. Enc. Law (2d Ed.) 862 b, note 6. Whoever invades the hallowed precincts of a home, and without justifiable cause, by any means whatsoever, severs the sacred tie that binds husband and wife, alienating her affections from him, and depriving

* A portion of the opinion dealing with an error in the instructions is omitted.

him of the aid, comfort, and happiness of a loyal union between them, is liable in civil damages for his wrongful conduct. *Rodgers, Dom. Rel. § 177*; *Schouler, Dom. Rel. § 41*; *Tiffany, Per. & Dom. Rel. 74*; *15 A. & E. Ency. Law, 862*. In such cases, whether or not there were malevolent or improper motives is always a material consideration. In case of a stranger in blood, the causes must be extreme that will warrant him in interfering with the relation of husband and wife. If he by advice or enticement induces a wife to leave her husband, or takes her away with or without her consent, and encourages her to remain from him, or harbors and protects her from him, he does these things at his peril, and the burden is on him to show good cause and good faith for his conduct. As is said by Mr. Rodgers: "It would seem upon principle to be rare, indeed, if the motive by a stranger in breaking up a family could be a good one." *Rodgers, Dom. Rel. § 176*; *1 Jaggard on Torts, 467*; *Tiff. Per. & Dom. Rel. 76*; *Schouler, Dom. Rel. 41*, and cases cited by these. But the rule is different in case of a parent. In *Hutcheson v. Peck*, 5 Johns. (N. Y.) 196, where a father harbored his daughter, Chancellor Kent says: "A father's house is always open to his children, and, whether they be married or unmarried, it is still to them a refuge from evil and a consolation in distress. Natural affection establishes and consecrates this asylum. I should require, therefore, more proof to sustain the action against the father than against the stranger. It ought to appear either that he detains the wife against her will, or that he entices her away from her husband from improper motives. Bad or unworthy motives cannot be presumed. They ought to be positively shown or necessarily deduced from the facts and circumstances detailed." See *Burnett v. Burkhead and Wife*, 21 Ark. 77, 76 Am. Dec. 358; *Trumbull v. Trumbull*, 71 Neb. 186, 98 N. W. 683, 8 Ann. Cas. 812; *Payne v. Williams*, 4 Baxt. (Tenn.) 585, and other cases cited in *Tiffany's Persons & Domestic Rel. p. 77*, note 116; *Brown v. Brown*, 124 N. C. 19, 32 S. E. 320, 70 Am. St. Rep. 574; *Glass v. Bennett*, 89 Tenn. 478, 14 S. W. 1085, and cases cited. Parents will not be protected under the above doctrine unless they acted from proper motives. *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. In actions of this character, "the term 'malice' does not necessarily mean that which must proceed from a spiteful, malignant, or revengeful disposition, but a conduct injurious to another, though proceeding from an ill-regulated mind not sufficiently cautious before it occasions the injury. If the conduct was unjustifiable and actually caused the injury complained of, malice in law would be implied." The terms "malice" and "improper motives," as here used, mean the same thing. *Brown v. Brown*, *supra*; *Tiffany's Persons & Dom. Rel. 76*. If no enticements are held out to the wife to leave her husband or to cease to love him, and nothing is said or done by a third party to cause her to abandon him, her act being of her own accord and for reasons best known to herself, then there is no cause of action for civil damages against any one for alienation

of affections; for in such case the estrangement would be voluntary and not the fault of any third party. Rodgers, Dom. Rel. p. 134, and cases cited. Instructions presenting these principles of the law were given by the court, and the charge upon the whole, except in the particular wherein the error has been pointed out, correctly submitted the issues to the jury. * * *

For the error indicated, reverse and remand for new trial, as to the appellant Boland. As to the appellant Robinson, the instruction was not prejudicial error, and the judgment as to him is affirmed.

II. Injuries to Wife³

FLANDERMEYER v. COOPER.

(Supreme Court of Ohio, 1912. 85 Ohio St. 327, 98 N. E. 102, 40 L. R. A. [N. S.] 360.)

On the 12th day of October, 1907, Lillie M. Cooper filed her amended petition in the court of common pleas of Cuyahoga county against Henry H. Flandermeyer, averring, in substance, that she was the wife of Charles A. Cooper, living and consorting with him as her husband, as the defendant well knew, until the peace and welfare of her home was destroyed by the unlawful, willful, negligent, malicious, and wrongful acts of the defendant, in this: That about the month of June, 1905, the defendant was a pharmacist, the proprietor of and conducting a drug store in the city of Cleveland; that with the full knowledge of the poisonous effects of morphine to create a growing desire and craving for additional quantities thereof, and without complying with the statutes of the state of Ohio, and without due inquiry as to whether the said Charles A. Cooper was aware of the insidious and dangerous character of said morphine, or whether said Cooper was then in fact practically ignorant of the effect of morphine, well knowing that this plaintiff was his wife, and that she was using every available means to cure and counteract her husband's act of using morphine, did knowingly, wrongfully, and unlawfully sell and administer morphine to the said Charles A. Cooper, although she frequently protested to the defendant against his further selling and administering such morphine, and expressly warned and prohibited said defendant from continuing said sales or administrations of morphine to her husband, well knowing that the constant use of this drug had created an irresistible appetite on the part of Cooper, well knowing that said drug was not being used for medicinal purposes, but

³ For discussion of principles, see Chapin on Torts, § 96.

through and on account of the craving that had fastened itself upon him by long use thereof, whereby he was becoming, and had become, a morphine fiend, and was thereby wrecking his mind and body; that said defendant, notwithstanding the protests and warning of plaintiff, continued to sell and administer quantities of morphine to Charles A. Cooper, said sales becoming more frequent until they occurred almost every day, and being in bulk quantities less than the minimum original package of one-eighth ounce, as provided by law, so that said Cooper became a slave to the morphine habit, and that he was thereby deprived of moral sensibility, and was unfitted and incapable to give the affection, society, companionship, and consortium which he had formerly given and which were due to plaintiff, as his wife, and thereby knowingly, willfully, and wrongfully depriving plaintiff of the affection, society, companionship, and consortium of her husband; and that finally, in consequence of defendant's unlawful and willful act, the said Charles A. Cooper, on the 16th day of June, 1906, was committed to an asylum and there detained for about one year, and alleged that she had been damaged by reason of the defendant's unlawful and willful act in the sum of \$2,000, for which she prayed damages.

At the trial the jury returned a verdict for the plaintiff in the sum of \$500.

DONAHUE, J.* The primary and most important question presented by this record is whether a wife has a common-law right of action against one who wrongfully and maliciously interferes with the marital relationship and deprives her of the society, companionship, and consortium of her husband. In the absence of a statute authorizing such recovery, her right to maintain this action rests wholly on the common law, and if the common law does not afford her a right of action, then she cannot maintain this suit, and the demurrer to the petition should have been sustained.

It is very clear that originally the common law recognized no such right in the wife. By the primitive law, the only member of the family deemed to be harmed by an unjustifiable disturbance of the family relation was the head of the family. Blackstone, in his Commentaries (volume 3, pp. 142, 143), says that these torts directed against the peace and tranquility of domestic relations are actionable only when committed against the husband. In the case of *Lynch v. Knight*, 9 H. L. 577, Lord Wensleydale held that "no recovery could be had without joining the husband in the suit, who himself must receive the money which would not advance the wife's remedy, and to allow her to recover in such an action would involve the absurdity that the husband might also sue for such a cause."

It must be remembered, however, that this interpretation of the common law, with reference to the wife's right to maintain an action

* The statement of facts is abridged and a portion of the opinion is omitted.

of this character, obtained upon the theory that the wife's personality merged in that of her husband's, and that she was not then entitled to hold property separate and apart from her husband, and not authorized to bring suit in her own name. Now the legal status of the wife has been changed by legislation. Her legal personality is no longer merged in that of her husband. By force of the several statutes in this state in reference thereto, a husband has no longer any dominion over the separate property of his wife, and she may maintain an action in her own name, without joining her husband in the suit. The right of action growing out of an injury to her personal rights is her separate property for which she may maintain an action in her own name. The right of the wife to the consortium of the husband is one of her personal rights. It therefore follows that the principle of the common law which allowed a right of action to the husband for the invasion of this right, now, under the changed condition of affairs and in view of the present legal status of the wife, applies to her equally with the husband.

It is said by Burdick, in his *Law of Torts*, at page 276, that: "With this change in her legal status came naturally a change in the judicial conception of her marital wrongs. As she could maintain an action in her own name, and damages recovered would be her sole and separate property, one of the chief objections urged by Lord Wensleydale disappeared. As the law now recognized her legal equality with her husband, Blackstone's reasoning, based upon the superiority of one party and the inferiority of the other party to the marital relation, had no longer the foundation of even a fiction."

A statutory right cannot change except by action of the lawmaking power of a state. But it is the boast of the common law that: "Its flexibility permits its ready adaptability to the changing nature of human affairs." So that whenever, either by the growth or development of society, or by the statutory change of the legal status of any individual, he is brought within the principles of the common law, then it will afford to him the same relief that it has theretofore afforded to others coming within the reason of its rules. If the wrongs of the wife are the same in principle as the wrongs of the husband, there is now no reason why the common law should withhold from her the remedies it affords to the husband.

Hale on *Torts*, on page 278, says: "In natural justice, no reason exists why the right of the wife to maintain an action against the seducer of her husband should not be coextensive with his right of action against her seducer. The weight of authorities and the tendency of the legislation strongly incline to the latter opinion."

1 Cooley on *Torts* (3d Ed.) p. 477, says: "Upon principle this right in the wife is equally valuable to her as property, as is that of the husband to him. Her right being the same as his in kind, degree, and

value, there would seem to be no valid reason why the law should deny to her the redress which it affords to him. * * * The gist of the action is the loss of consortium, which includes the husband's society, affection, and aid. The wife may have the action though she continues to live with her husband, and it is held that she may maintain it after a divorce from him."

This question, however, is fully settled in this state in the case of *Westlake v. Westlake*, 34 Ohio St. 621, 32 Am. Rep. 397. The first paragraph of the syllabus is as follows: "A wife may maintain an action for the loss of the society and companionship of her husband, against one who wrongfully induces and procures her husband to abandon or send her away." In the opinion, on page 627 of 34 Ohio St. (32 Am. Rep. 397), Gilmore, J., says: "If, in this state, the common-law dominion of the husband over the property and personal rights of the wife has been taken away from him and conferred upon her, and remedies in accordance with the spirit of the civil law have been expressly given to the wife for the redress of injuries to her person, property, and personal rights, all of which I hope to show has been done, then it must follow that she may maintain an action in her own name for the loss of the consortium of her husband against one who wrongfully deprives her of it, unless the consortium of her husband is not one of her personal rights. * * * Under our legislation, the benefit which the wife has in the consortium of the husband is equal to that which the husband has in the consortium of the wife. If, at common law, the husband could maintain an action for the loss of the consortium of the wife, I can see no reason why, under our law, the wife cannot maintain an action for the loss of the consortium of the husband. * * * Each acquires a personal as well as legal right to the conjugal society of the other, for the loss of which either may sue separately."

There can be no reasonable contention but that the wife suffers the same injury from the loss of consortium as the husband suffers from that cause. His right is not greater than hers. Each is entitled to the society and affection of the other. The rights of both spring from the marriage contract and in the very nature of things must be mutual, and while this was always true of the marriage relation, yet there was a time in the history of our jurisprudence when the legal status of the wife was such that she could not, at common law, maintain an action of this character. Now her legal status is the same as that of her husband. She has the same right to the control of her separate property, the same right to sue in her own name, and, in a word, is in the full enjoyment of every right that her husband enjoys, so that she comes clearly within the principles of the common law that allow a right of action by the husband for damages for the loss of the consortium of his wife. Either we must hold that the common law is fixed,

unchangeable, and immutable, that it possesses no such flexibility as will permit its ready adaptability to changing conditions of human affairs, or that when every reason and every theory for denying the wife the same rights as the husband has entirely disappeared from our jurisprudence, that she is now equally entitled with her husband to every remedy that the common law affords, and we have no hesitation in adopting the latter view.

It is insisted, however, that neither husband nor wife would have a right of action under the facts and circumstances of this case, and our attention is called to the fact that an enabling statute was necessary in order to permit a wife to recover damages to means of support by reason of intoxication caused by sales of liquor to the husband. This, however, is not a similar case. This is not an action for damages for loss of support, or loss of the earning capacity of the husband, but is wholly an action for damages for loss of consortium. Consortium is defined to be "the conjugal fellowship of husband and wife, and the right of each to the company, co-operation and aid of the other in every conjugal relation." *Bigaouette v. Paulet*, 134 Mass. 123, 45 Am. Rep. 307. This right is invaded whenever a third person, through machination, enticement, seduction, or other wrongful, intentional, and malicious interference with the marriage relation, deprives the husband or wife of the consortium of the other. The remedy for an invasion of these rights is not in the nature of the action for damages to means of support provided by the statutes relating to the sale of intoxicating liquors. It is said by Tiffany on Persons and Domestic Relations (2d Ed.) p. 80: "Whatever may have been the principle, originally, upon which this class of actions was maintained, it is certain that the weight of modern authority bases the action on the loss of consortium. * * * The suit is not regarded in the nature of an action by a master for the loss of the services of his servant, and it is not necessary that there should be any pecuniary loss whatever." No enabling statute was necessary to authorize a husband to maintain an action for the loss of consortium, and if we are right in our conclusion that the wife is now equally entitled to maintain this action, this contention of the plaintiff in error is completely answered.

The further claim is made by counsel for plaintiff in error that, to sustain an action for injury to one's consortium, the alleged injury must be the result of a force exerted directly upon the marriage relation for the purpose of injuring the plaintiff's consortium, and the act of the consort responding to that force must not be voluntary, citing *Holtz v. Dick*, 42 Ohio St. 23, 51 Am. Rep. 791. In that case this court declared that, "where damages are asked for the alienation of affection, each case must stand on its own facts." If the proposition that "the act of the consort responding to that force must not be voluntary" were to be adopted as an arbitrary rule of law in this state

controlling each and every case, then few or no such actions as this could be maintained. In the case of *Bigaouette v. Paulet*, supra, the court held that "a husband may maintain an action for the loss of the consortium of his wife against the person who has criminal conversation with her, whether such conversation is with or without her consent, and although the act caused no actual loss of her services to him."

The case of *Hart v. Knapp*, 76 Conn. 135, 55 Atl. 1021, 100 Am. St. Rep. 989, was a suit by the wife against another woman for the alienating of her husband's affection by acts of illicit intercourse. In that case the claim was made by the defendant that the wrong was not her wrong, but that of the husband, that her misconduct was induced by the persuasion of plaintiff's husband; but the court disposes of this contention in this language: "In what she did with the husband, she did with full knowledge that it was wrongful, and that it would, as the plaintiff claims it did, result in harm to the plaintiff. The gist of the advice set up in the requests is that the defendant did a great wrong by the persuasion of the husband. We know of no rule of law, civil or criminal, that absolves her from liability for such wrong because of such persuasion." * * *

The judgment of the circuit court is affirmed.

Judgment affirmed.

SPEAR, PRICE, and JOHNSON, JJ., concur.

III. Injuries to Parent⁵

BUTTERFIELD v. ASHLEY.

(Supreme Judicial Court of Massachusetts, 1850. 6 Cush. 249.)

This was an action of trespass on the case, for enticing away the plaintiff's son and servant from his employment. The action was tried in the court of common pleas, before Perkins, J., and came into this court upon exceptions to the judge's instructions to the jury.

METCALF, J. The question now to be decided is whether the instructions given to the jury upon the evidence introduced at the trial were warranted by the law of the case.

The declaration contains a single count in which it is alleged that the defendants, knowing that the plaintiff's son was in his employment and service, enticed him into their employment, put him on board a vessel, and sent him to sea on a whaling voyage. The evidence was that the son left his father's house in New Hampshire, without his father's consent and went to New Bedford; that he there applied to the defendants to

⁵ For discussion of principles, see Chapin on Torts, § 97.

employ him in a whaling vessel; that they, knowing him to be a minor, at first refused to employ him; but that, at his urgent solicitation and upon his representation that he had his father's consent to go on a voyage, they took him into their employment and sent him to sea. Upon this evidence the jury were instructed that the defendants were liable in this action, if the plaintiff never assented to his son's being employed by them, although they honestly believed that he had given his full consent. And we are of opinion that these instructions were wrong.

A master may maintain an action on the case against one who, knowing that another is his servant, entices him away from his service, or retains and employs him, after he has wrongfully left that service without being enticed away; and also against one who continues to employ his servant, after notice that he is such, though the defendant, at the time of retaining or employing him, did not know him to be a servant; and a father is the master of his minor child, within these rules of law. The books of entries contain forms of declarations adapted to these three distinct causes of action. And a plaintiff generally inserts at least two counts in his declaration; one for enticing, and another for employing or harboring; so that he may succeed on the latter, though he may fail to support the former. But in either form of declaring, it is a material and necessary allegation, that the defendant knew, at the time of enticing, employing, or harboring, that the party enticed away, employed, or harbored, was the servant of the plaintiff, or that he afterwards had notice thereof, and continued to employ or harbor the servant, after such notice. And such knowledge or notice must be proved, in order to support the action. See *Wentw.* Pl. 438; 2 *Chit.* Pl. (6th Amer. Ed.) 645, 646; 1 *Bl. Com.* 429; 3 *ib.* 142; *Fawcett v. Beavres*, 2 *Lev.* 63; *Blake v. Lanyon*, 6 *T. R.* 221; *Reeve's Dom. Rel.* 291; *Sherwood v. Hall*, 3 *Sumner*, 127, *Fed. Cas.* No. 12,777; *Ferguson v. Tucker*, 2 *Har. & Gill (Md.)* 182; *Conant v. Raymond*, 2 *Aikens (Vt.)* 243; *Fores v. Wilson*, *Peake's Cas.* 55.

The gist of an action like that now before us is, says Lord Mansfield, "that the defendant has enticed away a man who stood in the relation of servant to the plaintiff." *Hart v. Aldridge*, *Cowp.* 54, 56. And the enticing must be proved. 3 *Stark. Ev.* 1310; *Stuart v. Simpson*, 1 *Wend. (N. Y.)* 376. Now what is meant by "enticing away from the service" of another? So far as we know, the word "entice" has no technical meaning. But, in a declaration like that in this case, it must mean something quite different from a reluctant employment of another's servant, under a belief that the master has consented to that employment. The word is often joined, in the precedents of forms, with the words "solicit, seduce, persuade, and procure"; and it evidently imports an active and wrongful effort to detach a servant from his master's service, by offering inducements adapted to that end. In *Keane v. Boycott*, 2 *H. Bl.* 511, *Eyre, C. J.*, describes entice-

ment and its effect as a dissolution of the relation of master and servant "officiously." We see no evidence of enticement, in the present case. The son had wrongfully left his father's service, before he was employed by the defendants; so that the plaintiff's declaration is not sustained by the proof. If evidence of the mere employment of another's servant, knowing him to be such, would support a declaration for enticing him from his master, there would be no necessity for a count which omits the allegation of enticement, and charges only a retaining, employing, or harboring.

Besides, if, in the opinion of the jury, the defendants believed that the plaintiff had fully consented to their employing his son, then the material averment in the declaration, that they well knew that he was in the plaintiff's service, was not proved, but was disproved. For it is impossible that they should know him to be in the service of one whom they believed to have dispensed with his service. New trial ordered.

LAWYER v. FRITCHER.

(Court of Appeals of New York, Second Division, 1891. 130 N. Y. 239, 29 N. E. 267, 14 L. R. A. 700, 27 Am. St. Rep. 521.)

Action by Peter Lawyer against Peter G. Fritcher to recover damages for loss of services of plaintiff's daughter abducted by defendant. A judgment entered on a verdict for plaintiff was affirmed at general term, and defendant appeals.

The other facts fully appear in the following statement by PORTER, J.:

This action was brought by plaintiff against defendant to recover damages, as alleged in the complaint, for the abduction of plaintiff's infant daughter from the service of the plaintiff, her father, and also for seduction while she was absent from her father's house. It appears that the defendant, who is a man 60 years of age, and has a wife from whom he is not legally divorced, and who is living absent from him, on the 6th of May, 1886, came to the plaintiff's house, and had an interview with the plaintiff as well as his daughter. On the 16th day of May following he again came to the plaintiff's house, and had an interview with him and plaintiff's wife upon the subject of marrying Edith, plaintiff's daughter. During the interview with the plaintiff upon the latter day, upon the subject of the marriage of defendant to plaintiff's daughter, there was a conversation between them in regard to his legal right to contract marriage, and whether the conditions of separation from defendant and his wife were such as to allow of a valid marriage between defendant and plaintiff's daughter. The defendant represented that he had a legal right to marry, and the defendant drew a consent or contract to carry out such design, and induced the plaintiff and his wife to sign it. The consent or contract was

in these words: "To Home it may Concern: We the undersigned, are the father and mother of the bearer, Edith Lawyer. Whereas, Edith and P. J. Fritcher, of Sharon, wish to be united, we give our consent to their contracts. Richmondville, May 16, 1886. Peter Lawyer, Catherine Lawyer." After these representations were made, and this instrument signed, the defendant carried Edith to Portlandville, in Otsego county, a distance of about 30 miles from her home and residence of plaintiff; stayed at a public house at that place, and said to the lady who kept the house that he was married; occupied the same bed with Edith on the night of the 17th. The next day the defendant carried Edith to Sharon, Schoharie county, where the defendant resided, and stated to his housekeeper, who was a sister of Edith, that she was his wife. On the night of the 18th of May the defendant and Edith occupied the same room and the same bed. After Edith arrived there, and during the 18th and 19th days of May, there was a conversation between Edith and Julia, her sister, defendant's housekeeper, in which Julia told Edith that the defendant could not marry; that he had a wife living, and was not divorced from her. Thereafter Edith took poison and died on the 20th day of May. She was about 17 years of age, generally lived in her father's family, and performed service for him, though she did work out occasionally, but her father had received her wages. Edith partook of that poison, and died of it on the 20th day of May.

The principal question involved in this case is whether the plaintiff proved a loss of service, and damage in consequence thereof, sufficient to maintain the action. The trial judge charged the jury that the plaintiff was not entitled to recover damages for any loss of service by reason of the taking of the poison, and the death of Edith in consequence. Nevertheless the jury, under the charge of the court, found a verdict in favor of the plaintiff of \$800, besides costs. The general term was not unanimous in affirming the judgment on the verdict of the jury.

POTTER, J., (after stating the facts).⁶ I should not feel justified, in departing from my rule in this court, not to write an opinion upon the affirmance of a judgment in a common and ordinary case, except to reconcile differences of opinions by the judges of the court below, and to remove any resort to strained or doubtful reasoning to sustain the judgment appealed from, by a brief presentation of a feature of the case that was not distinctly brought out in that court. This action was brought to recover damages which the plaintiff alleged he has sustained by the unwarranted interference of the defendant with plaintiff's right to service. It is as well settled that he who unlawfully interferes with another's right to service, whether it be the service of a male or female, a minor or an adult, is liable for actual or compensatory damages in the same manner, and upon the same grounds, that he

⁶ The statement of facts is abridged and a portion of the opinion is omitted.

would be liable for an unlawful interference with any other property right of another. The plaintiff alleges that he is the father of Edith Lawyer; that at the time of the acts of the defendant complained of by the plaintiff she was 17 years of age, and was residing with the plaintiff, and that he was entitled to her services; and that without the consent of the plaintiff the defendant, on or about the 16th day of May, 1886, enticed and persuaded the said Edith Lawyer to leave the residence and service of the plaintiff, and to accompany him (the defendant) to Portlandville, in the county of Otsego, etc. The plaintiff also alleges that on the 17th day of May, 1886, the defendant debauched the said Edith, etc. The evidence in this case establishes beyond question that on and previous to the 16th day of May, 1886, Edith was the servant of plaintiff, both in law and fact. It follows from that relation that plaintiff was entitled to command and to have her services wholly and without interruption, save such time as was necessary for her rest, health, and preservation, until the plaintiff should give a valid consent to dispense with the service, or the law should terminate the relation. The defendant came to plaintiff's house, where she was in fact performing, and was in law bound to perform, services for the plaintiff, and took her from and deprived the plaintiff of such service. If this was done, as plaintiff alleges, without his consent, the defendant is liable to make plaintiff compensation for the loss of service. If the plaintiff's consent was obtained by defendant through fraud it was void, for fraud vitiates all contracts and all consents. Consent or no consent was one of the issues to be tried by the jury, and the jury has found, upon competent evidence for that purpose, that any consent given by plaintiff was given through fraud, and so was no consent. With this finding by the jury the court cannot interfere. Edith was taken away from the plaintiff by the defendant, and remained with him at an hotel, and on the way to defendant's home, and at his home, for the space of four days; and the plaintiff was in the mean time deprived of her services, and his right to them was unlawfully interfered with.

The gravamen of the action, and of all actions of this nature, is the loss of service, and both pleadings and the proofs in this case make out a cause of action in entire harmony with the fullest requirements of such actions, and entirely dispenses with any necessity or occasion to resort to fiction, as is said to be done in some instances to maintain the recovery of damages in these cases. In the aspect we have been considering this case, it presents an actual and measurable pecuniary damage to the plaintiff. The loss of service constitutes the cause of action, and it can make no difference, as to the right of action, whether that has been accomplished by an unlawful persuasion of the servant to leave the master's employment, or through fraud upon the master, or force upon the servant, or by both such fraud and force. The loss of service is the cause of action, and when that is established a basis for damages to some extent exists; and whether that loss is caused or

attended by or followed by sexual intercourse, defilement, or pregnancy, loss of health or disability to serve, or for the purpose or with an intention of obtaining those results through a formal, but criminal, marriage, has relation more especially to the damages the plaintiff may recover than to his cause of action.

It is true the complaint charged debauchment and ill health as a consequence, as well as the taking of the servant from the master. Whether the debauchment was proven or not, the taking away by the defendant was proven without any contradiction, and this gave plaintiff a cause of action and a right to damages. In such cases the jury have the right to impose punitive damages, in their discretion, in addition to compensatory damages. I think these views are abundantly supported by numerous decided cases, to a few of which I make reference and extracts. Judge Andrews, in *People v. De Leon*, 109 N. Y. 229, 16 N. E. 46, 4 Am. St. Rep. 444, says: "In *Regina v. Hopkins*, Car. & M. 254, the case of an indictment for the abduction of an unmarried girl under sixteen years of age, 'against the will' of her father, it appearing that the consent of the parents was induced by fraud, the indictment was sustained; and Gurney, B., said (in that case), 'I mention these cases to show that the law has long considered fraud and violence to be the same.'"

In *Lipe v. Eisenlerd*, 32 N. Y. 238 (which was an action by the father to recover damages for the seduction of his daughter, who was 29 years of age, but living in her father's family), this language is used: "And any illegal act by which the right of the father, such as it was, to her services, was interfered with, to his detriment, was a legal wrong, for which the law affords redress." On page 236 of the same case the judge uses this language: "Finally, it is urged by defendant's counsel that only compensatory damages should have been allowed. The judge refused so to direct the jury, and I think he was right. The object of the action, in theory, is to recover compensation for the loss of the services of the person seduced. This is so far adhered to that there must be a loss of that kind or the action will fail; but when that point is established the rule of damages is a departure from the system upon which the action is allowed. The loss of service is often merely nominal, though the damages which are recovered are very large. It is too late to complain of this as a departure from principle, for it has been the law of this state and of the English courts for a great many years." The same judge further on in the opinion uses this language: "The true rule [this being an action brought by plaintiff for the seduction of his daughter], I think, is that the plaintiff's right to the services may be made out in either way, and that, when established so that the action is technically maintainable, the court and jury are to consider whether the plaintiff, on the record, is so connected with the party seduced as to be capable of receiving injury through her dishonor. A mere master, having no capacity to be injured beyond the pecuniary worth of the services lost, should undoubtedly be limit-

ed in his recovery to the value of these services. But the case of this plaintiff, as has been mentioned, is quite different." In *Hewitt v. Prime*, 21 Wend. 79-82, Judge Nelson, in delivering the opinion of the court in an action like the one under consideration, uses this language: "It is now fully settled, both in England and here [citing several authorities in both countries] that acts of service by the daughter are not necessary. It is enough if the parent has a right to command them, to sustain the action. * * * The ground of the action has often been considered technical, and the loss of service spoken of as a fiction, even before the courts ventured to place the action upon the mere right to claim the services; they frequently admitted the most trifling and valueless acts as sufficient." Further on in the opinion the judge uses this language: "The action, then, being fully sustained, in my judgment, by proof of the act of seduction in the particular case, all the complicated circumstances that followed come in by way of aggravating the damages." * * *

The judgment should be affirmed, with costs. All concur, except PARKER, J., not sitting.

OBSTRUCTION AND PERVERSION OF LEGAL REMEDIES

I. Malicious Prosecution

1. NATURE OF PREVIOUS PROCEEDING¹

LUBY v. BENNETT.

(Supreme Court of Wisconsin, 1901. 111 Wis. 613, 87 N. W. 804, 56 L. R. A. 261, 87 Am. St. Rep. 897.)

Action to recover damages. The complaint stated the following as a cause of action: Plaintiff and defendant, from March 27 to November 6, 1897, were copartners in the shoe business in Janesville, Wis. Plaintiff contributed to such business \$4,400 in money and gave his personal attention thereto, which was reasonably worth \$100 per month. The sales were \$17,000, and there was a profit of 33 per cent. thereon, one-half of which justly belonged to plaintiff. On the last day named defendant maliciously and without probable cause commenced an action in the circuit court for Rock county, Wis., charging plaintiff, among other things, with having wrongfully taken from the assets of the firm, in goods and money, \$2,000 to \$2,500 and appropriated the same to his own use, and sold goods on credit without making any account thereof, intending to collect therefor and convert the proceeds to his exclusive benefit. The prayer was for a dissolution of the partnership and for a receiver. Without notice to this plaintiff, defendant procured the appointment of himself as receiver, and thereafter, pursuant thereto, took exclusive control of the firm property and business, and subsequently sold the same at a great sacrifice, secretly bidding the property in for his own benefit, whereby plaintiff's interest in the firm assets was wholly lost to him. The purpose of the action brought by defendant as stated was to accomplish the result before stated. By reason of the facts plaintiff was injured in his good name, was caused much mental pain, was seriously prejudiced in his efforts to obtain profitable employment, and caused to expend upward of \$1,500 in defending himself against the unjust action. Such proceedings were finally taken in such action that it was finally decided that the charges against plaintiff were false and malicious. Upon such facts plaintiff asked judgment in the sum of \$10,000.

Defendant demurred to the complaint for insufficiency, and the demurrer was overruled.

MARSHALL, J.² (after stating the facts). A right of action for dam-

¹ For discussion of principles, see Chapin on Torts, § 100.

² A portion of the opinion is omitted.

ages for malicious prosecution does not accrue till the wrongful proceeding has been brought to final determination in favor of the defendant or person accused. *Pratt v. Page*, 18 Wis. 337; *Winn v. Peckham*, 42 Wis. 493, 499; *Woodworth v. Mills*, 61 Wis. 44, 20 N. W. 728, 50 Am. Rep. 135; *Lawrence v. Cleary*, 88 Wis. 473, 60 N. W. 793; *Lowe v. Wartman*, 47 N. J. Law, 413, 1 Atl. 489; *Com. v. McClusky*, 151 Mass. 488, 25 N. E. 72. Hence, as indicated in the authorities cited, in an action to recover compensation for such a wrong, such final determination must be distinctly alleged in the complaint and proved upon the trial, the same as any other fact essential to the cause of action, or the pleading will be open to successful challenge for insufficiency. Appellant now invokes that rule, but as we read the complaint it seems that it is very clearly alleged that the wrongful prosecution was ended by a judgment in favor of the defendant therein before this action was commenced. The meaning of the language of the pleading, "It was finally decided and adjudged in said action on the 25th day of September, 1900, that said action was without foundation, and was maliciously and unjustly begun and that this plaintiff was and had not been guilty of any wrong, and awarded this plaintiff judgment therein against the plaintiff therein (the defendant in this action)," leaves no room for reasonable controversy but that the alleged wrongful prosecution was closed by a judgment in favor of respondent prior to the commencement of this suit. It is said that the receiver appointed had not made his report when this action was commenced, and that it indicates that the alleged wrongful prosecution was not ended. The rule invoked does not require that all proceedings that may be had or are required in an action to finally work out or enforce the rights of the parties shall occur before a cause of action will accrue to the defendant therein to prosecute the plaintiff for maliciously commencing and carrying on such action. It requires only that the issues material to the question of the bona fides of such action shall be tried and closed by final judgment. That was done in the case in question, notwithstanding the provisional remedy or ancillary proceeding therein, to control, administer and preserve the property involved, to await the final determination of the rights of the parties, was not fully closed up.

It is suggested that the action cannot be said to have been finally closed when this action was commenced because the right of appeal from the judgment to this court existed. There is authority to the effect that a judgment in favor of the defendant in the alleged wrongful action, appealed from to a higher court, does not satisfy the element of want of probable cause, and is insufficient to sustain a suit for malicious prosecution of such action. *Reynolds v. De Geer*, 13 Ill. App. 113; *Nebenzahl v. Townsend*, 61 How. Prac. (N. Y.) 353. In the first of such cases the decision went upon the ground that the alleged wrongful prosecution was in a justice court and that the appeal

from the judgment opened up the whole matter, giving the plaintiff therein a right to a trial *de novo*; and in neither case was the question under discussion raised by an objection to the sufficiency of the complaint, but the status of the alleged wrongful prosecution was treated as matter of defense. *Nebenzahl v. Townsend* is supported by numerous citations from English authorities to the effect that the plea of a pending appeal from the judgment in the first action is a good defense. In *Ingram v. Root*, 51 Hun, 238, 3 N. Y. Supp. 858, it is said that it is essential to allege in the complaint that the judgment in plaintiff's favor in the first action has not been appealed from, or that it has been appealed from and affirmed. No authority is cited to support that view, and none which we may safely follow exists. The decision is out of harmony with all others in the New York courts, and contrary to the settled law as declared by its highest court, as is clearly evidenced by *Marks v. Townsend*, 97 N. Y. 590, where it was held that a final judgment, in an action alleged to have been maliciously brought, satisfies the essential element of a final determination of the wrongful prosecution in an action to recover damages for such a wrong, notwithstanding the right of appeal therefrom exists; and that, if an appeal has been taken from the judgment and is actually pending, the judgment, till set aside or reversed, will stand for want of probable cause as much as any judgment can; that a pending appeal is effectual only to sustain an application for an order staying proceedings till the appeal shall have been determined. It is not necessary here to go that far. It is sufficient to hold that, on the question of the status of the alleged wrongful prosecution, it is sufficient to allege, in the action for damages on account of it, that judgment was rendered in favor of the defendant therein; and that if the defendant in the action for damages desires to defeat the plaintiff on that question, he must lay the foundation therefor by answer instead of by relying on an objection to the complaint by a demurrer for insufficiency (*Carter v. Paige*, 80 Cal. 390, 22 Pac. 188); that, while the pendency of an appeal may constitute a defense, in the absence of anything to show that there is a pending appeal from the judgment, the presumptions are in favor of the validity and justice thereof; that no allegation on that subject is necessary on the part of the person relying thereon; and that the mere right of appeal from a judgment in an alleged malicious prosecution does not affect the right of the defendant therein, if he is the prevailing party, to pursue his prosecutor in an action for damages.

The further claim is made that the complaint is insufficient because it shows that in the alleged wrongful prosecution the defendant was brought into court by the mere service of a summons, neither his personal liberty nor his property being interfered with. If the nature of the suit were such as appellant's counsel claim, there would be much authority to sustain their position. The rule in England, when this

country was within its jurisdiction, was and still is, that since costs are allowed to the successful defendant in a civil suit, they are presumed to compensate him for all damages suffered, if neither his person nor property is interfered with, regardless of whether the prosecution is maliciously wrongful or not. Ordinarily we would say that such rule should be regarded as part of the common law and binding upon courts here till changed by statute, the same as any other common-law principle. But it does not seem to have been so regarded to any great degree. Courts have treated the subject of whether the right to compensation for malicious prosecution of a mere civil case, without interference with person or property, exists, as matter of judicial policy, to be determined according to varying opinions of judges of supreme judicial tribunals; though the decisions in regard thereto, found in the books, are not based on that ground to any great degree, but on what was supposed to be the weight of authority. The result is that on an important branch of the law, that has been settled in England since costs were allowed to the successful defendant by the statute of Marlbridge (52 Hen. III.; 1267) the courts of the states of this Union, and the text-writers as well, are in as much confusion as in respect to any other branch of the law that could be suggested. What we say as to the law of England is supported by the following quotation from the opinion of Lord Bowen in *Mining Co. v. Eyre*, L. R. 11 Q. B. Div. 674, 690: "The broad canon is true that in the present day, and according to our present law, the bringing of an ordinary action, however maliciously, and however great the want of reasonable and probable cause, will not support a subsequent action for malicious prosecution. * * * The counsel for the plaintiff company have argued this case with great ability; but they cannot point to a single instance since Westminster Hall began to be the seat of justice in which an ordinary action, similar to the actions of the present day, has been considered to justify a subsequent action on the ground that it was brought maliciously and without reasonable and probable cause." To support what we have said as to the confusion of authority in this country, we refer to the following: In 3 Lawson, Rights, Rem. & Prac. § 1082, we are informed that "most of the earlier cases in the United States, and a few of the recent ones, follow the English rule; but others, and it would seem on better grounds, sustain the action," where neither person nor property is interfered with in the alleged wrongful action. The note to the text indicates that the authorities in favor of the English rule are much more numerous and are as recent as those to the contrary, and that the latter are based almost wholly on *Pangburn v. Bull*, 1 Wend. (N. Y.) 345; *Whipple v. Fuller*, 11 Conn. 582, 29 Am. Dec. 330; and *Closson v. Staples*, 42 Vt. 209, 1 Am. Rep. 316. An examination of those cases indicates that the rule, at its inception in this country, was founded in error. The first invasion of the common-law rule seems to have been made

in *Pangburn v. Bull* in 1828; the next in *Whipple v. Fuller*, 1836. In the first case it seems that the change in the ancient English rule, founded on the statute of Marlbridge, was overlooked. All the supporting American authorities cited by the court were cases of arrest and bail. In the Connecticut case the change in the English rule was recognized, but the court declined to follow it, preferring, for reasons stated, to follow the doctrine established prior to the statutory right of successful defendants to costs. The Vermont court followed Connecticut and adopted its reasoning. The cases referred to were followed in *Eastin v. Bank*, 66 Cal. 123, 4 Pac. 1106, 56 Am. Rep. 77, though it was said that the weight of authority, American as well as English, and the text-writers, is the other way. In *Kolka v. Jones*, 6 N. D. 461, 71 N. W. 558, 66 Am. St. Rep. 615, it seemed, to the court that the weight of American authority was against the English rule. In 14 Am. & Eng. Enc. Law, p. 34, it is said the authorities on the question are evenly balanced. * * *

So careful a writer as Judge Cooley does not venture to say definitely which way the weight of authority preponderates in this country, though his language leads one to believe that, in his judgment, it is in favor of the English rule. He confines the civil actions that may support one for damages for malicious prosecution by the settled law, to maliciously instituting and prosecuting proceedings in bankruptcy, suits in which the defendant is arrested, suits in which the property of the defendant is attached, and proceedings to have a party declared insane and placed under guardianship. He says, as to other civil actions: "In some cases it has been held that an action may be maintained for the malicious institution without probable cause, of any civil suit which has terminated in favor of the defendant; but the English authorities do not justify this statement, and there is much good reason in what has been said in a Pennsylvania case (*Mayer v. Walter*, 64 Pa. 283), that 'if the person be not arrested or his property seized, it is unimportant how futile and unfounded the action might be; as the plaintiff, in consideration of law, is punished by the payment of costs.' If every suit may be retried on an allegation of malice, the evils would be intolerable, and the malice in each subsequent suit would be likely to be greater than in the first." Cooley, *Torts* (2d Ed.) p. 219. The first significant case found in the American decisions is *Ray v. Law*, Pet. C. C. 207, Fed. Cas. No. 11,592, decided in 1816, where the English rule was followed to the letter, it being said that, "If bail be not demanded, it is unimportant how futile and unfounded the action may be, as the plaintiff is punished by the payment of costs and the defendant is not materially injured." The following authorities, in addition to those already referred to, support Judge Cooley's observation: *McNamee v. Minke*, 49 Md. 122; *Supreme Lodge v. Unverzagt*, 76 Md. 104, 24 Atl. 323; *Bitz v. Meyer*, 40 N. J. Law, 252, 29 Am. Rep. 233; *Potts v. Imlay*, 4 N. J. Law,

330, 7 Am. Dec. 603; *Woodmansie v. Logan*, 2 N. J. Law, 93; *Mitchell v. Railroad Co.*, 75 Ga. 398; *Kramer v. Stock*, 10 Watts (Pa.) 115; *Gorton v. Brown*, 27 Ill. 489, 81 Am. Dec. 245; *Ely v. Davis*, 111 N. C. 24, 15 S. E. 878; *Cade v. Yocum*, 8 La. Ann. 477; *Thomas v. Rouse*, 2 Brev. (S. C.) 75. The doctrine of those cases and the mischief it is aimed at are well indicated by the following language from the opinion in *Ely v. Davis*, supra: "We may as well say that the law seems to be settled by the weight of authority, although there are some decisions to the contrary, that an action will not lie for malicious prosecution in a civil suit, unless there was an arrest of the person or seizure of property, as in attachment proceedings at law or their equivalent in equity, or in the proceedings in bankruptcy, or like cases, where there was some special damage resulting from the action, and which would not necessarily result in all cases of the like kind." "The policy of the law, while encouraging arbitrations and settlements without suit, has ever been to afford fair opportunity to all to have their claims determined in the courts. To hold it now to be that in every case of failure by the plaintiff to establish his allegation of fraud, there being no special damage resulting therefrom, upon a suggestion of malice and want of probable cause, an action for malicious prosecution would lie against him, would open the floodgate to a species of litigation hitherto unknown in North Carolina, the absence of which, up to the present time, indicates that it has not heretofore been recognized." The Iowa court, in *Wetmore v. Mellinger*, supra [64 Iowa, 741, 18 N. W. 870, 52 Am. Rep. 465], mentioned, as considerations for the doctrine that the malicious prosecution of a mere civil suit, without interference with the person or property of the defendant, will not sustain an action for damages, the following: "The courts are open and free to all who have grievances and seek remedies therefor, and there should be no restraint upon a suitor, through fear of liability resulting from his action, which would keep him from the courts. * * * If an action may be maintained against a plaintiff for the malicious prosecution of a suit without probable cause, why should not a right of action accrue against a defendant who defends without probable cause and with malice?"

From what has been said it will be seen that the proposition submitted and contended for by appellant's counsel ought not to receive approval as the law of this state without the most careful consideration of the subject in a case necessarily depending upon a correct solution of it. As at present advised, we are not prepared to say that such a case has been heretofore decided by this court. *Noonan v. Orton*, 30 Wis. 356, was not such a case. There the plaintiff's property was seriously interfered with by successive, unnecessary and vexatious equitable levies thereon in garnishee proceedings, and the ground of the action was abuse of the process of the court. In our judgment the present case does not necessarily turn on the broad proposition con-

tended for. The alleged wrongful action was not an ordinary suit, where neither person nor property was interfered with, and where there was no danger other than such as generally results from ordinary civil actions in such circumstances. The action was brought ostensibly for the purpose of winding up a partnership. Before it was commenced, respondent was in possession of the partnership property as much as appellant. The purpose of the action was to as effectually deprive him of that possession and subject it, in invitum, to the claim of appellant, as if it were levied upon by writ of attachment. Under such circumstances damages other than taxable costs necessarily follow. Moreover, special damages are expressly alleged in the complaint. The pleader says, in effect, that the purpose of the plaintiff was, by means of the winding-up proceedings, to obtain possession of the partnership property, in form as an officer of the court for the benefit of the person legally entitled thereto, but in fact for the benefit of the plaintiff; and, through the forms of law, to administer the property ostensibly for the legitimate purpose of a winding-up suit, but in fact to enable the plaintiff to control the property, and, in an indirect way, to obtain the full title thereto; and that such purpose was fully consummated, whereby respondent's interest in the firm assets was wholly lost to him. The same reasoning that supports an action for damages for maliciously and without probable cause instituting and prosecuting proceedings to have a person declared a bankrupt applies to an action maliciously brought to wind up a partnership, founded on alleged misconduct of the defendant. In quite a recent English case to which we have already referred (*Mining Co. v. Eyre*) wherein the rule that an ordinary civil action, neither the property nor person of the defendant being interfered with, causing special damage, though maliciously brought and prosecuted, will not sustain an action for damages, was maintained with as much clearness and firmness as in any previous case, it was held that an action maliciously brought and prosecuted to wind up a partnership should not be classed with those where the damages to the defendant are deemed to be *damnum absque injuria*; but under the third head of actionable wrongs growing out of malicious prosecutions, laid down by Holt, C. J., in *Savill v. Roberts*, 1 Ld. Raym. 374, 378, namely, actions where a man's fair fame and credit are injured, it was said that such an action is not like an ordinary action for fraud, where the wrong done by merely bringing the action is supposed to be remedied by the vindication of the defendant at the trial; but its effect is like that in wrongful proceedings in bankruptcy—the good name, fame and credit of the person accused is necessarily seriously injured. That seems plain, and it is equally plain that such actions fall within the class held to constitute a good foundation for an action for damages for malicious prosecution on account of the interference with property rights. Any particular method of interfering with property rights, as by writ of attachment, is not material.

An equitable levy upon property, as in garnishee proceedings, or the deprivation of the defendant of his property by means of the appointment of a receiver, or any other means whereby his property is taken into the custody of the court or taken out of the custody of the owner and out of his free control, as in *Noonan v. Orton*, *supra*, which, in the ordinary course of things, causes damage not reached by a mere judgment of vindication or for costs, is sufficient. This action was not commenced by service of a summons and prosecuted without the person or property of the defendant being interfered with directly to his damage; but, as before indicated, the defendant was deprived of the possession of his property, and a growing business, of which he was part owner, was abruptly stopped and closed out, necessarily causing loss to him, not only by depreciation in the value of the firm assets, but by destruction of the business in which the property was used, and by injuring respondent's good name and fair fame as a merchant and member of the community.

The further point is made that the complaint is insufficient because it does not contain an allegation that the plaintiff was damaged by the wrongs complained of to some specific amount. That must be ruled against appellant on the well-settled principle that, where damages are necessarily inferable from the facts alleged, a statement of such facts sufficiently states the damages. *Luessen v. Power Co.*, 109 Wis. 94, 85 N. W. 124; 4 Enc. Pl. & Prac. p. 618.

The order appealed from is affirmed.

2. COMMENCEMENT OF PREVIOUS PROCEEDING^{*}

HALBERSTADT v. NEW YORK LIFE INS. CO.

(Court of Appeals of New York, 1909. 194 N. Y. 1, 86 N. E. 801, 21 L. R. A. [N. S.] 293, 16 Ann. Cas. 1102.)

Appeal by permission from an order of the Appellate Division of the Supreme Court, in the first judicial department entered May 8, 1908, which reversed an interlocutory judgment of Special Term sustaining a demurrer to the second and third defenses of the answer and overruled such demurrer.

The questions certified are:

First. Whether the matter set up as a second, further and separate defense in the paragraphs numbered III and IV in the answer is insufficient in law upon the face thereof to constitute a defense to the complaint.

Second. Whether the matter set up as a third, further and separate

^{*} For discussion of principles, see Chapin on Torts, § 100.

defense in the paragraphs numbered III, IV, and V in said answer is insufficient in law upon the face thereof to constitute a defense to the complaint.

The action is brought to recover damages for an alleged malicious prosecution claimed to have been instituted by the respondent against the appellant in Mexico. It is in the complaint, amongst other things, alleged that the respondent through its agent in the Criminal Court of the City of Mexico charged the appellant with the crime of embezzlement, "and thereupon and in and by virtue of said charge and the institution of said criminal proceedings a warrant was issued by said court for the arrest of the plaintiff (in this action)," and that thereafter "the said criminal proceedings for the punishment of said plaintiff were dismissed and extinguished and the said prosecution was thereby wholly determined * * * in favor of the plaintiff."

The respondent by its second defense, which is challenged here for insufficiency, alleged in substance that, before the warrant referred to in the complaint could be served upon the appellant and before he could be apprehended, "he left the republic of Mexico, and thereafter continuously remained absent, * * * and by such absence avoided being arrested under such warrant, or being tried, * * * but remained absent from said republic of Mexico for a sufficient period of time to enable him to procure the dismissal of said proceedings under the law of Mexico on account solely of the lapse of time," and, conversely, that said criminal proceedings "were not dismissed on account of a determination of the case in favor of the plaintiff on the trial thereof on the merits, nor was it dismissed for failure to prosecute said case except as above set forth, nor was it dismissed on account of any withdrawal of the complaint."

The third defense, also challenged, repeats the foregoing allegations and alleges that "the departure of the plaintiff * * * was for the purpose of avoiding arrest, and by so absconding the said plaintiff did avoid arrest," and in substance that he did so for the purpose and with the result of procuring a dismissal of the criminal proceeding in accordance with the laws of Mexico on account of the lapse of time alone, and "by reason of the premises said plaintiff could not be brought to trial and was never tried in said court to answer to said charge."

Hiscock, J.⁴ This appeal involves interesting questions in an action for malicious prosecution raised by demurrer to certain affirmative defenses which have been pleaded.

The respondent's first reply to the appellant's attack upon its answer is of the *tu quoque* nature, it insisting that the complaint is as deficient in the statement of a good cause of action as the answer is alleged to be in the statement of a good defense. This contention is based upon the fact that the complaint does not allege any act sub-

⁴ Portions of the opinion of Hiscock, J., are omitted.

sequent or in addition to the mere issuance of a warrant in the criminal proceeding complained of; does not allege that the warrant was ever executed in any way whatever, or that the appellant was ever actually brought into said proceedings either by force of process or voluntary appearance. Therefore the question is presented whether the mere application for and issuance to a proper officer for execution of a warrant on a criminal charge may institute and constitute such a prosecution as may be made the basis of a subsequent civil action by the party claimed to have been injured. In considering this question we must keep in mind that the facts alleged in the complaint, and in the light of which it is to be determined, do not show, as the answer does, that the defendant in those proceedings was beyond the jurisdiction of the court.

This question does not seem to have been settled by any decision which we regard as controlling on us.

The respondent cites the following authorities deciding it in the negative: *Newfield v. Copperman* (Sp. Term) 15 Abb. Prac. (N. S.) 360; *Lawyer v. Loomis*, 3 Thomp. & C. 393; *Cooper v. Armour* (C. C.) 42 Fed. 215, 8 L. R. A. 47; *Heyward v. Cuthbert*, 4 McCord (S. C.) 354; *O'Driscoll v. McBurney*, 2 Nott & McC. (S. C.) 54; *Bartlett v. Christhlf*, 69 Md. 219, 14 Atl. 518; *Gregory v. Derby*, 8 C. & P. 749; *Paul v. Fargo*, 84 App. Div. 9, 82 N. Y. Supp. 369.

The case last cited was concerned with an alleged malicious prosecution by means of civil process, and what was there said must be interpreted with reference to that fact, and thus interpreted it is not applicable here. Of the other cases, only two, *Heyward v. Cuthbert* and *Cooper v. Armour*, considered the question here involved with sufficient thoroughness to require brief comment. An examination will show that the decision in each of them rested in whole or part on a principle not, as I believe, adopted in this state. In the former it was said that, "The foundation of this sort of action is the wrong done to the plaintiff by the direct detention or imprisonment of his person." As I think we shall see hereafter, that is not a correct statement of the law in this state. In the other case it was stated, "The only injury sustained by the person accused, when he is not taken into custody, and no process has been issued against him, is to his reputation; and for such an injury the action of libel or slander is the appropriate remedy, and would seem to be the only remedy." I think that this doctrine, which if correct would provide an adequate remedy outside of an action for malicious prosecution for an injured party in a case where no warrant had been executed, also is opposed to the weight of authority both in this state and elsewhere hereafter to be referred to.

The authorities holding to the contrary on the question above stated, and that the execution of the warrant is not necessary to lay the foundation for an action of malicious prosecution, are *Addison on Torts*, vol. 2 (4th Eng. Ed.) p. 478; *Newell on Malicious Prosecution*, § 30; *Stephens on Malicious Prosecution* (Am. Ed.) § 8; *Stapp v.*

Partlow, Dud. (Ga.) 176; Clarke v. Postan, 6 C. & P. 423; Feazle v. Simpson, 1 Scam. (2 Ill.) 30; Britton v. Granger, 13 Ohio Cir. Ct. R. 281, 291; Holmes v. Johnson, 44 N. C. 44; Coffey v. Myers, 84 Ind. 105. And to the like effect in the absence of special statutory provisions is Swift v. Witchard, 103 Ga. 193, 29 S. E. 762.

Thus it is apparent, as before stated, that there is no controlling decision on this question and we are remitted to a search for some general considerations which may be decisive. It seems to me that these may be found and that they favor the view that a prosecution may be regarded as having been instituted even though a warrant has not been executed.

The first one of these considerations is found in the rule applied in civil actions and proceedings to an analagous situation. There it has many times been held that the mere issue of various forms of civil process for service or other execution is sufficient independent of statute to effect the commencement of a case or proceeding. *Carpenter v. Butterfield*, 3 Johns. Cas. (N. Y.) 146; *Cheetham v. Lewis*, 3 Johns. (N. Y.) 42; *Bronson v. Earl*, 17 Johns. (N. Y.) 63; *Ross v. Luther*, 4 Cow. (N. Y.) 158, 15 Am. Dec. 341; *Mills v. Corbett*, 8 How. Prac. (N. Y.) 500; *Hancock v. Ritchie*, 11 Ind. 48, 52; *Howell v. Shepard*, 48 Mich. 472, 12 N. W. 661; *Webster v. Sharpe*, 116 N. C. 466, 471, 21 S. E. 912.

I see no reason why a similar rule should not be applied to criminal proceedings, at least for the purposes of such an action as this.

Then there is another reason resting on justice which seems to me to lead us to adopt this conclusion. In opposition to what was said in the South Carolina case already referred to, the sole foundation for an action of malicious prosecution is not "the wrong done to the plaintiff by the direct detention or imprisonment of his person." In an action for false imprisonment that would be so. But in an action of the present type, the substantial injury for which damages are recovered and which serves as a basis for the action may be that inflicted upon the feelings, reputation, and character by a false accusation as well as that caused by arrest and imprisonment. This element "indeed is in many cases the gravamen of the action." *Sheldon v. Carpenter*, 4 N. Y. 579, 580, 55 Am. Dec. 301; *Woods v. Finnell*, 13 Bush (Ky.) 628; *Townsend on Slander*, § 420; *Wheeler v. Hanson*, 161 Mass. 370, 37 N. E. 382, 42 Am. St. Rep. 408; *Gundermann v. Buschner*, 73 Ill. App. 180; *Lawrence v. Hagerman*, 56 Ill. 68, 8 Am. Rep. 674; *Davis v. Seeley*, 91 Iowa, 583, 60 N. W. 183, 51 Am. St. Rep. 356.

But, no matter how false and damaging the charge may be in a criminal proceeding upon which a warrant may be issued, damages for the injury caused thereby cannot under any ordinary circumstances be recovered in an action for libel or slander. *Howard v. Thompson*, 21 Wend. (N. Y.) 319, 324, 34 Am. Dec. 238; *Woods v. Wiman*, 47

Hun (N. Y.) 362, 364, *Sheldon v. Carpenter*, supra; *Dale v. Harris*, 109 Mass. 193; *Gabriel v. McMullin*, 127 Iowa, 427, 103 N. W. 355; *Hamilton v. Eno*, 81 N. Y. 116; *Newell on Malicious Prosecution*, § 10.

Therefore it follows that a person who has most grievously injured another by falsely making a serious criminal accusation against him whereon a warrant has been actually issued may escape all liability by procuring the warrant at that point to be withheld unless an action for malicious prosecution will lie. It seems to me that under such circumstances we should hold that such will lie, if for no other reason than to satisfy that principle of law which demands an adequate remedy for every legal wrong.

Deciding, therefore, that the appellant's complaint does state a cause of action, we are brought to the direct consideration of the respondent's answer. I do not think that there is such substantial difference between the two defenses which are questioned as calls for any separate treatment of them. Liberally construed, as the pleader is entitled to have them in the face of a demurrer, each one amounts to this, that the appellant fled from Mexico before the warrant could be served on him for the purpose of avoiding service, and remained out of the country and beyond the jurisdiction of the court for such a length of time that the criminal proceeding was finally dismissed, presumably because prosecution was not and could not be carried on. The question is whether a dismissal or discontinuance of a criminal proceeding under such circumstances is that kind of a termination which will support an action for malicious prosecution. If it is, the answers are bad; otherwise, not.

While it is elementary that a criminal proceeding must be terminated before an action for malicious prosecution can be begun, there has been much discussion of the nature of this necessary termination. The best idea of what is essential may be gathered by reference to some pertinent authorities.

In *Wilkinson v. Howell*, 22 E. C. L. R. 368, 1 M. & M. N. P. 495, it appeared that the court in the criminal proceeding complained of had ordered a *stet processus* with the consent of the parties. It was said by Lord Tenterden "that the termination (of the criminal proceeding) must be such as to furnish *prima facie* evidence that the action was without foundation," and that the termination in question did not furnish any such evidence.

In *McCormick v. Sisson*, 7 Cow. (N. Y.) 715, 717, criminal proceedings were suspended because the parties declared that they had settled all matters of difficulty between them. The court held that there was no proper termination of the proceeding, saying: "It is essential that the plaintiff prove he has been acquitted. The discharge must be in consequence of the acquittal. The action cannot be sustained unless the proceedings are at an end by reason of an acquittal."

In *Gallagher v. Stoddard*, 47 Hun (N. Y.) 101, it appeared that the

plaintiff, after being arrested, paid the officer having him in custody some money, which was receipted for by the defendant and the officer, and he was thereupon discharged. It was held that this was not enough.

In *Atwood v. Beirne*, 73 Hun, 547, 26 N. Y. Supp. 149, it appeared that there had been cross criminal proceedings and it was arranged that the respective complainants should be absent on the days to which the proceedings were adjourned and each complaint thus fell for want of prosecution. It was held that this was not a sufficient termination to support a subsequent action for malicious prosecution.

In *Jones v. Foster*, 43 App. Div. 33, 35, 59 N. Y. Supp. 738, it was said that the theory on which such an action as this is sustainable "is that the proceeding out of which the action arose has terminated successfully to the defendant, exonerating him from the charge made."

In *Leyenberger v. Paul*, 40 Ill. App. 516, it was established that there had been an adjournment of the criminal proceedings to a certain day and that the attorney for the defendant in that proceeding in violation of his agreement went before the magistrate and procured the dismissal of the charge for want of prosecution. It was held that this was not sufficient, the court saying: "But a nolle prosequi by consent, or by way of compromise, or where such exemption from further prosecution has been demanded as a right, or sought for as a favor, is not enough. The principle of the cases is that the discharge or acquittal must be by judicial action under such circumstances as that the party accused has not avoided or prevented judicial investigation." * * *

From all of these authorities added to others which are more familiar I think two rules fairly may be deduced. The first one is that where a criminal proceeding has been terminated in favor of the accused by judicial action of the proper court or official in any way involving the merits or propriety of the proceeding or by a dismissal or discontinuance based on some act chargeable to the complainant as his consent or his withdrawal or abandonment of his prosecution, a foundation in this respect has been laid for an action of malicious prosecution. The other and reverse rule is that, where the proceeding has been terminated without regard to its merits or propriety by agreement or settlement of the parties or solely by the procurement of the accused as a matter of favor or as the result of some act, trick or device preventing action and consideration by the court, there is no such termination as may be availed of for the purpose of such an action. The underlying distinction which leads to these different rules is apparent. In one case the termination of the proceeding is of such a character as establishes or fairly implies lack of a reasonable ground for his prosecution. In the other case no such implication reasonably follows. *Townsend on Slander*, § 423.

When we apply these rules to the defenses which have been pleaded it is evident that they sufficiently allege a termination of the Mexican proceeding which is not of a character to sustain this action, and ought

not to be. That proceeding came to a dismissal and end, not because of any judicial action in favor of the accused for lack of merits or because of a withdrawal or abandonment of it by the prosecuting party, but simply because the defendant therein succeeded in escaping from the country and eluding the jurisdiction of the court and thereby preventing a prosecution. He by his flight, as in other cases the accused had done by agreement, settlement or trick, prevented a consideration of the merits, and he ought not now to be allowed to claim that there were no merits.

In some of the cases refusing to allow the maintenance of such an action as this by a party who had procured a discontinuance of criminal proceedings by settlement, it has been said that the reason for such rule is that such settlement was so far a recognition of the propriety of the proceeding that a party making it is subsequently estopped from questioning them. It may be that the conduct of the present appellant in fleeing from Mexico was discreet or even justifiable by virtue of facts which do not appear to us. At the present time, however, it does not to my mind carry any such presumption of innocence in connection with the termination of the proceedings in that country as impliedly condemns them for having been instituted maliciously and without ground. * * *

Therefore I think that these cases do not either singly or collectively sustain the burden which appellant has sought to impose especially upon them of furnishing an authority for the reversal of the order appealed from and for all the reasons stated the latter should be affirmed, with costs and the questions certified to us answered in the negative.

VANN, J. I concur in the result because there was merely an attempt to prosecute with no actual prosecution. The Mexican court did not acquire jurisdiction of the person of the plaintiff for he was not arrested, nor was process or notice of any kind served upon him. He was not brought into court and the prosecution could not end because it was never begun. He could not be a party defendant until he was notified or voluntarily appeared. He was threatened with prosecution, but neither his person nor his property was touched. There can be no prosecution unless knowledge thereof is brought home to the alleged defendant in some way. If there had been a prosecution commenced the crime could not have outlawed during the defendant's absence, as is admitted of record. While in civil actions, in order to arrest the statute of limitations, "an attempt to commence an action in a court of record, is equivalent to the commencement thereof," still the attempt goes for naught unless followed by service, actual or constructive, within sixty days. Code Civ. Proc. § 399. The rule was similar at common law. Although, in order to prevent injustice, an action was deemed to be commenced by the delivery of process for service, it was never treated as effectual for any purpose unless actual serv-

ice was subsequently made. The authorities cited in the prevailing opinion illustrate this proposition.

In the absence of controlling authority, which it is conceded does not exist, I favor restricting rather than enlarging the scope of the action. This accords with the general position of the court upon the subject.

GRAY, HAIGHT, and CHASE, JJ., concur with HISCOCK, J. CULLEN, C. J., and WILLARD BARTLETT, J., concur with VANN, J.
Order affirmed.

3. PROBABLE CAUSE FOR PREVIOUS PROCEEDING⁵

KNAPP v. CHICAGO, B. & Q. R. Co.

(Supreme Court of Iowa, 1901. 113 Iowa, 532, 85 N. W. 769.)

A four-ply belt, 7 inches wide and 47 feet long, owned and used by the Chicago, Burlington & Quincy Railway in sawing wood near its roundhouse at Ottumwa, was stolen June 8, 1898, and the defendant Harrison was detailed by said company to ascertain the guilty parties. On the eighteenth of July following, he filed a preliminary information accusing the plaintiff and his son Louis of the crime and at the same time sued out a search warrant for the belt, which was supposed to be the one in use at plaintiff's stone quarry. On hearing, it was found the belt was in value less than \$20, and the accused were discharged. Thereupon an information was signed by Harrison and filed in which the same offense was alleged; the value of the property being correctly stated. Change of venue was taken, a trial had, and the defendants therein again discharged. In this action plaintiff charges that the proceedings mentioned were with malice and without probable cause. The jury so found and from the judgment awarding damages the defendants appeal. Reversed.

LADD, J. The railroad company is responsible in no other respect than as employer of Harrison. The latter had no acquaintance whatever with the plaintiff or any member of his family prior to the eighteenth of July, 1898—the day the preliminary information was filed and the search warrant sued out. But he had previously talked with members of the police force and had been advised that one of plaintiff's sons was a suspicious character and had been convicted of larceny and served a term in the penitentiary; and also by Noah, whose beat included his residence that plaintiff had complained to him of the need of a belt to use in his quarry, being short of money to buy one, and he (Noah) had suggested that the company's belt would be found there. On that day he had gone with several employes of the company

⁵ For discussion of principles, see Chapin on Torts, § 100.

who had used the belt in controversy in sawing, to plaintiff's stone quarry, and together they had examined that on plaintiff's engine and pump. These men had positively identified the belt as that of the company—even pointing out identification marks. The belt had been cut down at one side and buckets attached. Upon his return from one trip to the quarry he met plaintiff, who declared the belt was his, and that he had bought it of Harper-McIntyre Company, but immediately, upon Harrison's assertion that it was owned by the company, plaintiff offered to pay what it was worth for it, rather than have any trouble. As Harrison estimated its value at \$34 and Knapp thought it cost not more than \$16 or \$17, there was no settlement. This was the information upon which Harrison acted, and which he had laid before reputable counsel who advised the prosecution. Were the facts and circumstances such as to warrant him, as an ordinarily cautious and prudent man in the belief of defendant's guilt? That a 7-inch four-ply belt of the railroad company was stolen cannot be doubted. One employé had purposely marked it by scratching a cross with a file and the holes through which to draw the whang strings had been cut instead of punched. The belt on the pump had been cut off and only part of these holes appeared, but the cross was visible. Five witnesses insisted that it was the company's belt, and so testified on this trial. It is said that another conclusion would have been reached had a sample like the company's belt been compared with that on the pump. A sufficient answer to this is that these witnesses found them the same. Was the prosecutor bound to disbelieve them? Certainly not, unless the claim of ownership should have led them to make further inquiry. But that claim was repudiated almost as soon as made, by recognizing the company's title in offering to pay the value of the belt. Under such circumstances, Harrison was not bound to treat the claim of purchase from Harper-McIntyre Company as seriously made. Even if he had inquired of that company, the record disclosed no information he might have received; and, from the fact that plaintiff did not avail himself of the evidence of any of its employés on the trial, it may well be inferred none were able to confirm his story. Besides, neither the existence nor location of such a company is shown by the record. We think that the prosecutor had the right to conclude from the facts then within his knowledge that plaintiff was in possession of the stolen belt, and as this was shortly after the theft, that the latter was the guilty person. The recent possession of stolen property clearly amounts to probable cause. *McDonald v. Railway Co.*, 3 Ariz. 96, 21 Pac. 338. True, an explanation is admissible but the prosecutor is not bound to seek it unless the circumstances are such as to call for an investigation. No explanation was attempted as plaintiff subsequently insisted that he was owner. Such cases must be determined on the situation as it was at the time, and not according to subsequent developments. If Harrison was reasonably diligent in ascertaining the facts,

as he certainly was, then the sole question is, Was he justified in believing plaintiff guilty at the time he began the prosecution? Ninety-nine men out of a hundred would have reached the same conclusion, and the attorney was warranted in giving the advice upon which Harrison acted. The rule generally recognized was thus stated in *Erb v. Insurance Co.*, 112 Iowa, 357, 83 N. W. 1053: "What facts and whether particular facts constitute probable cause is a question exclusively for the court." This case presents a state of facts calling for its application. We do not say plaintiff was guilty, for there is much in the record tending to show the contrary as to him; nor is this essential in order to find defendants had probable cause. The innocent are sometimes erroneously prosecuted, but if with probable cause owing to the peculiar circumstances hedging them in they have no cause of action against the prosecutor. *McGillivray v. Case*, 107 Iowa, 17, 77 N. W. 483, disposes of the appellee's contention with reference to the record. Because of the error in not directing a verdict for defendants, the judgment is reversed.

4. MALICE IN INSTITUTING PREVIOUS PROCEEDING *

PULLEN v. GLIDDEN.

(Supreme Judicial Court of Maine, 1877. 66 Me. 202.)

On exceptions.

Case for malicious prosecution.

The defendant made complaint for forgery against the plaintiff before a magistrate, on which the plaintiff was arrested, and after examination acquitted and discharged from arrest. The plaintiff thereupon brought this action, on the trial of which the presiding justice, upon request of the plaintiff's counsel, instructed the jury that there was no probable cause for the prosecution. He further charged as appears in the opinion. The verdict was for the defendant; and the plaintiff alleged exceptions.

LIBBEY, J. This is an action for malicious prosecution. The presiding judge instructed the jury that there was not probable cause for the prosecution. Upon the question of malice he instructed the jury as follows: "In regard to the other branch of the case necessary to be established by the plaintiff, it is that there was malice; that the prosecution was malicious. Now, what is 'malice?' There are several kinds of malice; but the two kinds of malice that may perhaps be considered in this charge are malice in law and malice in fact." Now, what is malice in law? Malice in law is such malice as is inferred from the commis-

* For discussion of principles, see Chapin on Torts, § 100.

sion of an act wrongful in itself, without justification or excuse. This is not the kind of malice required in this case. The malice required to be proved in this case is malice in fact. Malice in fact is where the wrongful act was committed with a bad intent, from motives of ill will, resentment, hatred, a desire to injure, or the like. Did such kind of malice exist in the mind of the defendant when he commenced the prosecution in question? Did he do it from bad intent, from evil motives, or did he not? Malice may be inferred from want of probable cause, or it may be inferred and proved by other evidence in the case." Again: "If you should find that there was no malice, such as I have described, the plaintiff could not maintain this action."

The plaintiff complains that this instruction required the jury to find malice in its more restricted, popular sense, when proof of malice in its enlarged, legal sense was all that the law requires. To maintain his case, it was necessary for the plaintiff to prove malice in fact, as distinguished from malice in law. Malice in law is where malice is established by legal presumption from proof of certain facts, as in actions for libel, where the law presumes malice from proof of the publication of the libelous matter. Malice in fact is to be found by the jury from the evidence in the case. They may infer it from want of probable cause. But it is well established that the plaintiff is not required to prove "express malice," in the popular signification of the term, as that defendant was prompted by malevolence, or acted from motives of ill will, resentment, or hatred towards the plaintiff. It is sufficient if he prove it in its enlarged, legal sense. "In a legal sense, any act done willfully and purposely, to the prejudice and injury of another, which is unlawful, is, as against that person, malicious." *Commonwealth v. Snelling*, 15 Pick. (Mass.) 337. "The malice necessary to be shown, in order to maintain this action, is not necessarily revenge, or other base and malignant passion. Whatever is done willfully and purposely, if it be at the same time wrong and unlawful, and that known to the party, is, in legal contemplation, malicious." *Wills v. Noyes*, 12 Pick. (Mass.) 324. See, also, *Page v. Cushing*, 38 Me. 523; *Humphries v. Parker*, 52 Me. 502; *Mitchell v. Wall*, 111 Mass. 492. We think, from a fair construction of the instruction upon this point, the jury must have understood that, in order to find for the plaintiff, they must find that the defendant, in prosecuting the plaintiff, was actuated by "express malice," in the popular sense of the term. In this respect it was erroneous.

Exceptions sustained.

APPLETON, C. J., and DICKERSON, DANFORTH, VIRGIN, and PETERS, JJ., concurred.

5. TERMINATION OF PREVIOUS PROCEEDING⁷

See *Luby v. Bennett*, *supra*, p. 279, and *Halberstadt v. New York Life Ins. Co.*, *supra*, p. 286.

II. Malicious Abuse of Process⁸

GRAINGER v. HILL.

(Court of Common Pleas, 1838. 4 Bing. N. C. 212.)

TINDAL, C. J.⁹ This is a special action on the case, in which the plaintiff declares that he was the master and owner of a vessel which, in September, 1836, he mortgaged to the defendant for the sum of £80, with a covenant for repayment in September, 1837, and under a stipulation that, in the meantime, the plaintiff should retain the command of the vessel, and prosecute voyages therein for his own profit; that the defendants, in order to compel the plaintiff through duress to give up the register of the vessel, without which he could not go to sea before the money lent on mortgage became due, threatened to arrest him for the same unless he immediately paid the amount; that, upon the plaintiff refusing to pay it, the defendants, knowing he could not provide bail, arrested him under a *capias*, indorsed to levy £95. 17s. 6d., and kept him imprisoned, until, by duress, he was compelled to give up the register, which the defendants then unlawfully detained; by means whereof the plaintiff lost four voyages from London to Caen. There is also a count in *trover* for the register. The defendants pleaded the general issue; and, after a verdict for the plaintiff, the case comes before us on a double ground, under an application for a nonsuit, and in arrest of judgment. * * *

The second ground urged for a nonsuit is that there was no proof of the suit commenced by the defendants having been terminated. But the answer to this and to the objection urged in arrest of judgment, namely, the omission to allege want of reasonable and probable cause for the defendants' proceeding, is the same—that this is an action for abusing the process of the law, by applying it to extort property from the plaintiff, and not an action for a malicious arrest or malicious pros-

⁷ For discussion of principles, see Chapin on Torts, § 100.

⁸ For discussion of principles, see Chapin on Torts, § 101.

⁹ The statement of facts, portions of the opinion of Tindal, C. J., and the entire opinions of Park, Vaughan, and Bosanquet, JJ., are omitted.

ecution, in order to support which action the termination of the previous proceeding must be proved, and the absence of reasonable and probable cause be alleged as well as proved. In the case of a malicious arrest, the sheriff at least is instructed to pursue the exigency of the writ; here the directions given, to compel the plaintiff to yield up the register, were no part of the duty enjoined by the writ. If the course pursued by the defendants is such that there is no precedent of a similar transaction, the plaintiff's remedy is by an action on the case, applicable to such new and special circumstances; and his complaint being that the process of the law has been abused, to effect an object not within the scope of the process, it is immaterial whether the suit which that process commenced has been determined or not, or whether or not it was founded on reasonable and probable cause. * * *

III. Unauthorized Suit in Another's Name ¹⁰

BOND v. CHAPIN.

(Supreme Judicial Court of Massachusetts, 1844. 8 Metc. 31.)

This case came before the court on the following bill of exceptions, signed by the judge before whom a trial was had in the court of common pleas: "This is an action on the case for damages for the wrongful and injurious commencement and prosecution, by the defendant, of an action in the name of one Thomas Bond, against the now plaintiff, without probable cause, and without authority so to do. The declaration is in the case, and may be referred to. The evidence was submitted to the jury, with instructions from the court, that in order to entitle the plaintiff to a verdict, he must prove the former action to have been commenced and prosecuted maliciously, that is to say, with some improper motive, or without due care to ascertain his rights, as well as without authority and without probable cause. The jury returned a verdict for the defendant, and the plaintiff, feeling himself aggrieved by the instructions aforesaid, files his exceptions thereto," etc.

HUBBARD, J.¹¹ * * * In the present suit, which is an action on the case against the defendant for prosecuting a suit in the name of Thomas Bond against the plaintiff, the plaintiff avers, in his declaration (which accompanies the exceptions), that the defendant, without authority from said Thomas and having no reasonable ground for believing that anything was due from the plaintiff to him, attached the plaintiff's property, and prosecuted said suit against him, from No-

¹⁰ For discussion of principles, see Chapin on Torts, § 102.

¹¹ A portion of the opinion is omitted.

vember term, 1840, to November term, 1841, when he became nonsuit; and evidence was offered tending to prove these allegations. The instructions to the jury were that "the plaintiff must prove the former action to have been commenced and prosecuted maliciously, that is to say, with some improper motive, or without due care to ascertain his rights, as well as without authority, and without probable cause." The error complained of may have arisen from not distinguishing, during the trial, between an action on the case for malicious prosecution and an action on the case for prosecuting a suit in the name of a third person, without authority, by reason of which the defendant sustains injury.

In a suit for malicious prosecution, the gist of the action is malice; but there must also exist the want of probable cause. And, without the proof of both facts, the action cannot be maintained, though the existence of malice may often be inferred from the want of probable cause. But in an action on the case for damages for prosecuting a suit against the plaintiff without authority, in the name of a third person, the gist of the action is not a want of probable cause; for there may be a good cause of action; but for the improper liberty of using the name of another person in prosecuting a suit, by which the defendant in the action is injured. Nor is the proof of malice essential to the maintenance of such action. If the party supposes he has authority to commence a suit, when in fact he has none, and the nominal plaintiff does not adopt it, the action fails for want of such authority. In such case, though the party supposed he had authority, and acted upon that supposition, without malice, still, if the defendant suffers injury by reason of the prosecution of the unauthorized suit against him, he may maintain an action for the actual damages sustained by him, in the loss of time, and for money paid to procure the discontinuance of the suit, but nothing more. Where, however, in addition to a want of authority, the suit commenced was altogether groundless, and was prosecuted with malicious motives—which may be inferred from there existing no right of action, as well as proved in other ways—then, in addition to the actual loss of time and money, the party may recover damages for the injury inflicted on his feelings and reputation.

In this case, the learned judge having instructed the jury that a want of probable cause and malice must concur with the want of authority to commence the suit in the name of a third person, to enable the plaintiff to maintain the action, we think there was error in the instruction, and that, though the damages might be enhanced by showing malice and a want of probable cause, yet that the proof of them is not essential to the maintenance of the action.

New trial granted.

IV. Maintenance and Champerty¹²

GEER v. FRANK.

(Supreme Court of Illinois, 1899. 179 Ill. 570, 53 N. E. 965, 45 L. R. A. 110.)

CARTWRIGHT, J. David S. Geer filed the original bill in this case in the superior court of Cook county, alleging that on August 29, 1895, he entered into an agreement with Robert J. Frank, by which Frank assigned to him an undivided one-third of a claim of said Frank against the American Automatic Lighting Company, F. A. Cody, and L. T. Lawton, in consideration of his services to be rendered in prosecuting the same; that Frank agreed that he would not make any compromise, settlement, release, or satisfaction of the claim, without Geer's consent; that Geer prosecuted the case, and obtained a judgment in favor of Frank for \$1,007.66 and costs; that Frank settled the judgment with the defendants therein, and satisfied the same, and refused to account; and that J. L. Bennett claimed some interest in the fund. The bill made said parties defendants, together with others who were alleged to have the fund or some portion of it, and prayed for the appointment of a receiver and an accounting, and a decree for the sum due. Bennett answered the bill, admitting its averments, and filed a cross-bill setting out the agreement in *hæc verba*, as follows: "It is agreed, by and between Robert J. Frank, David S. Geer, and J. L. Bennett, that said Frank assigns to said Geer and Bennett each a one-third interest in his claim against the American Automatic Lighting Company, Cody, and Lawton. Said Geer, in consideration of said assignment, is to give his legal services, in conjunction with said Bennett, to the prosecution of any suits or other proceedings for the liquidation and settlement of said claim. Said Bennett, in consideration of said assignment, is to pay the necessary expenses, in the way of cash outlays, for court costs, etc., and give an equal amount of his legal services, in the same manner as Mr. Geer. For the costs and expenses already paid, said Bennett has paid said Frank \$25 in cash, and is to pay the balance, as requested by said Frank. It is agreed by all of said parties that no settlement or compromise of said claim shall be made without the assent of all parties. Chicago, Ill., August 29, 1895. Robert J. Frank. David S. Geer. J. L. Bennett." Bennett then alleged in his cross-bill that he rendered services as an attorney, in conjunction with Geer, in the collection of the claim, and paid Frank \$59.69, on his request, under the agreement to pay costs and expenses, and that Frank settled the judgment for \$700, and refused to

¹² For discussion of principles, see Chapin on Torts, § 103.

account. He therefore asked for a decree for what was due him. The bill and cross-bill were answered by the other defendants; and Frank denied the right of Geer and Bennett, or either of them, to an accounting, alleged that the contract was not performed or his suit properly prosecuted, and charged that the agreement was unlawful. Upon a hearing, the superior court dismissed the bill and cross-bill, and the complainant in each appealed. The appellate court affirmed the decree, and granted a certificate of importance, by virtue of which Geer and Bennett are in this court as appellants, asking a reversal of the judgment of the appellate court. It appeared, on the hearing, that there had been an agreement between Geer and Frank, previous to the one of August 29, 1895, alleged in the bill and set out in the cross-bill, by which previous agreement Geer was to prosecute the claim, and receive one-half the amount recovered or received, in settlement for his professional services, and Frank was to advance the costs. That agreement is not a subject for consideration here, both because it was not alleged in the bill or made a foundation for any claim, and because it was abandoned, and the agreement so alleged between the three parties was substituted for it.

Disregarding all other questions argued, we are of the opinion that the agreement is illegal and void. It was said in *Newkirk v. Cone*, 18 Ill. 449, that the common law of champerty had been abolished in this state, but this statement was corrected in *Thompson v. Reynolds*, 73 Ill. 11, where it was said the former decision was manifestly a mistake, and that the question was not involved in such former decision, the champertous agreement having been abandoned by the parties, by mutual consent. The law of champerty has been somewhat qualified by our decisions, but it is a part of the law of the state. We have held, in consonance with the great weight of modern authority, that an attorney may make an agreement for contingent fees of a legitimate character, by which he is to receive a certain share or part of the money or thing recovered. *Commissioners v. Coleman*, 108 Ill. 591; *Phillips v. Commissioners*, 119 Ill. 626, 10 N. E. 230. In such a case, he has no interest in the litigation, except that of an attorney, and to the extent of his legal services; and if such a contract is not against conscience, and reasonable in its terms, a court of equity would doubtless enforce it. The law, however, does not permit a person having no interest in the subject-matter of a suit to become interested in it, and concerned in its prosecution; and an agreement by which such person, although an attorney, agrees to bear expense and costs of litigation, falls within the definition of champerty, and will not be enforced, either at law or in equity. *Gilbert v. Holmes*, 64 Ill. 548; *Thompson v. Reynolds*, *supra*. Under these rules, the agreement between Bennett and Frank was champertous, and the undertakings of Geer and Bennett were so mutually dependent upon each other, as a consideration for the agreement of Frank, that the whole contract was

tainted with illegality. The considerations for Frank's promise were the agreement of Geer to render legal services in conjunction with Bennett, Bennett's agreement to render legal services in conjunction with Geer, and Bennett's agreement to pay the costs and expenses. The agreement could not be performed, and Geer render the services which he promised, except by Bennett carrying out his champertous agreement, and it was so executed. The undertakings cannot be separated, and, one of the considerations inducing the promise of Frank being illegal, the entire contract is void, and a court of equity will not aid in its enforcement.

The judgment of the appellate court is affirmed. Judgment affirmed.

NEGLIGENCE

I. Duty of Occupant of Land

1. TO TRESPASSER¹

FROST v. EASTERN R. R.

(Supreme Court of New Hampshire, 1887. 64 N. H. 220, 9 Atl. 790, 10 Am. St. Rep. 396.)

Case, for personal injuries from the alleged negligence of the defendants in not properly guarding and securing a turntable. The plaintiff, who sues by his father and next friend, was seven years old when the accident occurred. Plea, the general issue. A motion for a nonsuit was denied, and the defendants excepted. Verdict for the plaintiff.

CLARK, J. The ground of the action is that the defendants were guilty of negligence in maintaining a turntable insecurely guarded, which, being wrongfully set in motion by older boys, caused an injury to the plaintiff, who was at that time seven years old, and was attracted to the turntable by the noise of the older and larger boys turning and playing upon it. The turntable was situated on the defendants' land, about sixty feet from the public street, in a cut with high, steep embankments on each side; and the land on each side was private property and fenced. It was fastened by a toggle, which prevented its being set in motion unless the toggle was drawn by a lever, to which was attached a switch padlock, which being locked prevented the lever from being used unless the staple was drawn. At the time of the accident the turntable was fastened by the toggle, but it was a controverted point whether the padlock was then locked. When secured by the toggle and not locked with the padlock, the turntable could not be set in motion by boys of the age and strength of the plaintiff.

Upon these facts we think the action cannot be maintained. The alleged negligence complained of relates to the construction and condition of the turntable, and it is not claimed that the defendants were guilty of any active misconduct towards the plaintiff. The right of a landowner in the use of his own land is not limited or qualified like the enjoyment of a right or privilege in which others have an interest, as the use of a street for highway purposes under the general law, or for other purposes under special license (*Moynihan v. Whidden*, 143 Mass. 287, 9 N. E. 645), where care must be taken not to infringe upon the lawful rights of others. At the time of his injury the plain-

¹ For discussion of principles, see Chapin on Torts, § 106.

tiff was using the defendants' premises as a playground without right. The turntable was required in operating the defendants' railroad. It was located on its own land so far removed from the highway as not to interfere with the convenience and safety of the public travel, and it was not a trap set for the purpose of injuring trespassers. *Aldrich v. Wright*, 53 N. H. 404, 16 Am. Rep. 339. Under these circumstances, the defendants owed no duty to the plaintiff; and there can be no negligence or breach of duty where there is no act or service which the party is bound to perform or fulfil. A landowner is not required to take active measures to insure the safety of intruders, nor is he liable for an injury resulting from the lawful use of his premises to one entering upon them without right. A trespasser ordinarily assumes all risk of danger from the condition of the premises; and to recover for an injury happening to him he must show that it was wantonly inflicted, or that the owner or occupant, being present and acting, might have prevented the injury, by the exercise of reasonable care after discovering the danger. *Clark v. Manchester*, 62 N. H. 577; *State v. Railroad*, 52 N. H. 528; *Sweeny v. Railroad*, 10 Allen (Mass.) 368, 87 Am. Dec. 644; *Morrissey v. Railroad*, 126 Mass. 377, 30 Am. Rep. 686; *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514; *Morgan v. Hallowell*, 57 Me. 375; *Pierce v. Whitcomb*, 48 Vt. 127, 21 Am. Rep. 120; *McAlpin v. Powell*, 70 N. Y. 126, 26 Am. Rep. 555; *St. L. & T. H. R. R. Co. v. Bell*, 81 Ill. 76, 25 Am. Rep. 269; *Gavin v. Chicago*, 97 Ill. 66, 37 Am. Rep. 99; *Wood v. School District*, 44 Iowa, 27; *Gramlich v. Wurst*, 86 Pa. 74, 27 Am. Rep. 684; *Cauley v. P. C. & St. Louis Railway Co.*, 95 Pa. 398, 40 Am. Rep. 664; *Gillespie v. McGowan*, 100 Pa. 144, 45 Am. Rep. 365; *Mangan v. Atterton*, L. R. 1 Ex. 239. The maxim that a man must use his property so as not to incommode his neighbor only applies to neighbors who do not interfere with it or enter upon it. *Knight v. Abert*, 6 Pa. 472, 47 Am. Dec. 478. To hold the owner liable for consequential damages happening to trespassers from the lawful and beneficial use of his own land would be an unreasonable restriction of his enjoyment of it.

We are not prepared to adopt the doctrine of *Railroad Co. v. Stout*, 17 Wall. 657, 21 L. Ed. 745, and cases following it, that the owner of machinery or other property attractive to children is liable for injuries happening to children wrongfully interfering with it on his own premises. The owner is not an insurer of the safety of infant trespassers. One having in his possession agricultural or mechanical tools is not responsible for injuries caused to trespassers by careless handling, nor is the owner of a fruit tree bound to cut it down or enclose it, or to exercise care in securing the staple and lock with which his ladder is fastened, for the protection of trespassing boys who may be attracted by the fruit. Neither is the owner or occupant of premises upon which there is a natural or artificial pond, or a blueberry pasture, legally required to exercise care in securing his gates and bars to guard against accidents to straying and trespassing children. The owner is

under no duty to a mere trespasser to keep his premises safe; and the fact that the trespasser is an infant cannot have the effect to raise a duty where none otherwise exists. "The supposed duty has regard to the public at large, and cannot well exist as to one portion of the public and not to another, under the same circumstances. In this respect children, women, and men are upon the same footing. In cases where certain duties exist, infants may require greater care than adults, or a different care; but precautionary measures having for their object the protection of the public must as a rule have reference to all classes alike." *Nolan v. N. Y., N. H. & H. Railroad Co.*, 53 Conn. 461, 4 Atl. 106.

There being no evidence to charge the defendants with negligence, the motion for a nonsuit should have been granted.

2. TO LICENSEE²

PLUMMER v. DILL.

(Supreme Judicial Court of Massachusetts, 1892. 156 Mass. 426, 31 N. E. 128, 32 Am. St. Rep. 463.)

Tort, for personal injuries occasioned to the plaintiff by striking her head upon a projecting sign placed against a post at the outside corner of the landing of the defendant's building. A verdict was directed for the defendant; and the plaintiff alleged exceptions.

KNOWLTON, J.³ If we assume that it was the duty of the defendant to keep the entrance, stairway, and halls of his building reasonably safe for persons using them on an invitation express or implied, and if we further assume that he negligently permitted them to be unsafe, and that his negligence caused the injury to the plaintiff, and that she was in the exercise of due care—some of which propositions are at least questionable—we come to the inquiry whether the plaintiff was a mere licensee in the building, or was there by the defendant's implied invitation.

She did not go there to transact with any occupant of the building any kind of business in which he was engaged, or in the transaction of which the building was used or designed to be used. She was in search of a servant; and for her own convenience she went there to inquire about a matter which concerned herself alone.

It has often been held that the owner of land or a building, who has it in charge, is bound to be careful and diligent in keeping it safe for

² For discussion of principles, see Chapin on Torts, § 106.

³ A portion of the opinion is omitted.

those who come there by his invitation express or implied, but that he owes no such duty to those who come there for their own convenience, or as mere licensees. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 87 Am. Dec. 644; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66, 16 N. E. 701; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846. One who puts a building or a part of a building to use in a business, and fits it up so as to show the use to which it is adapted, impliedly invites all persons to come there whose coming is naturally incident to the prosecution of the business. If the place is open, and there is nothing to indicate that strangers are not wanted, he impliedly permits and licenses persons to come there for their own convenience, or to gratify their curiosity. The mere fact that premises are fitted conveniently for use by the owner or his tenants, and by those who come to transact such business as is carried on there, does not constitute an implied invitation to strangers to come and use the place for purposes of their own. To such persons it gives no more than an implied license to come for any proper purpose.

It is held in England that one who comes on an express invitation to enjoy hospitality as a guest must take the house as he finds it, and that his right to recover for any injury growing out of dangers on the premises is no greater than that of a mere licensee. *Southcote v. Stanley*, 1 H. & N. 247. The principle of the decision seems to be that a guest, who is receiving the gratuitous favors of another, has no such relation to him as to create a duty to make the place where hospitality is tendered safer or better than it is. It is well settled there that to come under an implied invitation, as distinguished from a mere license, the visitor must come for a purpose connected with the business in which the occupant is engaged, or which he permits to be carried on there. There must at least be some mutuality of interest in the subject to which the visitor's business relates, although the particular thing which is the object of the visit may not be for the benefit of the occupant. *Pollock on Torts*, 417; *Holmes v. North Eastern Railway*, L. R. 4 Ex. 254; S. C. L. R. 6 Ex. 123; *White v. France*, 2 C. P. D. 308; *Burchell v. Hickisson*, 50 L. J. Q. B. 101.

The rule in regard to an implied invitation to places of business is held with equal strictness in New York. In *Larmore v. Crown Point Iron Co.*, 101 N. Y. 391, 4 N. E. 752, 54 Am. Rep. 718, it was decided that a person, who entered on the defendant's premises to see if the defendant would give him employment, was a mere licensee, and that the defendant was not liable to him for an injury caused by the unsafe condition of the place. The diligence of counsel and an extended examination of the authorities have failed to bring to our attention any case in which the owner or occupant of a place fitted up for ordinary use in business has been held by the condition of his premises impliedly to invite persons to come there for a purpose in which the occupant had no interest, and which had no connection with the business

actually or apparently carried on there. Precisely how far, under all circumstances, an implied invitation extends in reference to the persons to be included in it, has not been the subject of very full consideration in this commonwealth, and is hardly capable of exact statement. But in many cases there is language indicating that the invitation extends only to those who come on business connected with that carried on at the place, and for the transaction of which the place is apparently intended. In *Severy v. Nickerson*, 120 Mass. 306, 21 Am. Rep. 514, Mr. Justice Devens says: "There is no duty imposed upon an owner or occupant of premises to keep them in a suitable condition for those who come there for their own convenience merely, without any invitation, either express or which may fairly be implied from the preparation and adaptation of the premises for the purposes for which they are appropriated." In *Marwedel v. Cook*, 154 Mass. 235, 236, 28 N. E. 140, we find this language: "The general duty which the defendants owed to third persons, in respect to the passages of the building, is well expressed in the instructions to the jury at the trial: 'If the defendants leased rooms in the building to different tenants, reserving to themselves the control of the halls, stairways, and elevator, by and through which access was to be had to these rooms, and the general lighting arrangements of those passages, then the defendants were bound to take reasonable care that such approaches were safe and suitable at all times, and for all persons who were lawfully using the premises, and using due care, so far as they ought to have reasonably anticipated such use as involved in and necessarily arising out of the purposes and business for which said rooms were leased.'"

In *Learoyd v. Godfrey*, 138 Mass. 315, 323, the plaintiff, a police officer, was expressly invited to the premises by a daughter of the occupant to arrest an intoxicated person who was making disturbance in the house. In *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421, no question was considered or clearly raised about the invitation to the plaintiff. In *Davis v. Central Congregational Society*, 129 Mass. 367, 37 Am. Rep. 368, the plaintiff went to the defendant's church under an express invitation authorized by the defendant, and the object of her visit was among those contemplated by the defendant when the building was erected. The language used in the cases in this commonwealth and in other states indicates that the rule in regard to the extent of the invitation implied from the preparation of property for use in business is the same here as laid down in the cases above cited from the courts of New York and of England. *Sweeny v. Old Colony & Newport Railroad*, 10 Allen, 368, 87 Am. Dec. 644; *Elliott v. Pray*, 10 Allen, 378, 87 Am. Dec. 653; *Carleton v. Franconia Iron & Steel Co.*, 99 Mass. 216; *Metcalf v. Cunard Steamship Co.*, 147 Mass. 66, 16 N. E. 701; *Heinlein v. Boston & Providence Railroad*, 147 Mass. 136, 16 N. E. 698, 9 Am. St. Rep. 676; *Reardon v. Thompson*, 149 Mass. 267, 21 N. E. 369; *Gordon v. Cummings*, 152 Mass. 513, 25 N. E. 978, 9 L. R. A. 640, 23 Am. St. Rep. 846; *Curtis v. Kiley*, 153

Mass. 123, 26 N. E. 421; *Stevens v. Nichols*, 155 Mass. 472, 29 N. E. 1150, 15 L. R. A. 459; *Campbell v. Portland Sugar Co.*, 62 Me. 552, 16 Am. Rep. 503; *Parker v. Portland Publishing Co.*, 69 Me. 173, 31 Am. Rep. 262.

In *Low v. Grand Trunk Railway*, 72 Me. 313, 24 Am. Rep. 331, it was held that the owner of a wharf was liable to a customhouse officer, who was upon it in the performance of his duty to prevent smuggling in the nighttime, for an injury resulting from a defective condition of the wharf. The officer was there to prevent unlawful conduct in connection with the business carried on at the wharf with the consent of the owner, and the owner might fairly be supposed to anticipate and desire, and impliedly to invite, his presence there to protect the defendant's property from those who would unlawfully use it. Neither decision nor the cases cited in the opinion, when carefully examined, will be found to give any countenance to the view that one who visits a building for a purpose not connected with the use for which the building was fitted, or to which it is put, is impliedly invited to come there. * * *

On the facts of the case before us, we are of opinion that the plaintiff was a mere licensee in the defendant's building, and that the rulings at the trial were correct.

Exceptions overruled.

3. TO INVITE⁴

INDERMAUR v. DAMES.

(Court of Common Pleas, Hilary Term, 1866. L. R. 1 C. P. 274. In the Exchequer Chamber, Hilary Term, 1867. L. R. 2 C. P. 311.)

The judgment of the Court [of Common Pleas] was delivered by WILLES, J.⁵ This was an action to recover damages for hurt sustained by the plaintiff's falling down a shaft at the defendant's place of business, through the actionable negligence, as it was alleged, of the defendant and his servants.

At the trial before the Lord Chief Justice at the sittings here after Michaelmas Term, the plaintiff had a verdict for £400 damages, subject to leave reserved.

A rule was obtained by the defendant in last term to enter a nonsuit, or to arrest the judgment, or for a new trial because of the verdict being against the evidence. The rule was argued during the last term, before Erle, C. J., Keating and Montague Smith, JJ., and myself, when

⁴ For discussion of principles, see Chapin on Torts, § 106.

⁵ The statement of facts and part of the opinions of Willes, J., and Kelly, C. B., are omitted.

we took time to consider. We are now of opinion that the rule ought to be discharged.

It appears that the defendant was a sugar refiner, at whose place of business there was a shaft four feet three inches square, and twenty-nine feet three inches deep, used for moving sugar. The shaft was necessary, usual, and proper in the way of the defendant's business. Whilst it was in use, it was necessary and proper that it should be open and unfenced. When it was not in use, it was sometimes necessary, with reference to ventilation, that it should be open. It was not necessary that it should, when not in use, be unfenced; and it might then without injury to the business have been fenced by a rail. Whether it was usual to fence similar shafts when not in use did not distinctly appear; nor is it very material, because such protection was unquestionably proper, in the sense of reasonable, with reference to the safety of persons having a right to move about upon the floor where the shaft in fact was, because in its nature it formed a pitfall there. At the time of the accident it was not in use, and it was open and unfenced.

The plaintiff was a journeyman gas-fitter in the employ of a patentee who had supplied the defendant with his patent gas regulator, to be paid for upon the terms that it effected a certain saving; and, for the purpose of ascertaining whether such a saving had been effected, the plaintiff's employer was required to test the action of the regulator. He accordingly sent the plaintiff to the defendant's place of business for that purpose; and, whilst the plaintiff was engaged upon the floor where the shaft was, he (under circumstances as to which the evidence was conflicting, but) accidentally, and, as the jury found, without any fault or negligence on his part, fell down the shaft, and was seriously hurt.

It was argued that, as the defendant had objected to the plaintiff's working at the place upon a former occasion, he (the plaintiff) could not be considered as having been in the place with the defendant's leave at the time of the accident; but the evidence did not establish a peremptory or absolute objection to the plaintiff's being employed, so as to make the sending of him upon the occasion of the accident any more against the defendant's will than the sending of any other workman: and the employment, and the implied authority resulting therefrom to test the apparatus, were not of a character involving personal preference (*dilectus personæ*), so as to make it necessary that the patentee should himself attend. It was not suggested that the work was not journeyman's work.

It was also argued that the plaintiff was at best in the condition of a bare licensee or guest, who, it was urged, is only entitled to use the place as he finds it, and whose complaint may be said to wear the color of ingratitude, so long as there is no design to injure him. See *Hounsell v. Smyth*, 7 C. B. (N. S.) 371.

We think this argument fails, because the capacity in which the plaintiff was there was that of a person on lawful business, in the course of fulfilling a contract in which both the plaintiff and the defendant had an interest, and not upon bare permission. No sound distinction was suggested between the case of the servant and the case of the employer, if the latter had thought proper to go in person; nor between the case of a person engaged in doing the work for the defendant pursuant to his employment and that of a person testing the work which he had stipulated with the defendant to be paid for if it stood the test, whereby impliedly the workman was to be allowed an onstand to apply that test, and a reasonable opportunity of doing so. Any duty to enable the workman to do the work in safety seems equally to exist during the accessory employment of testing: and any duty to provide for the safety of the master workman seems equally owing to the servant workman whom he may lawfully send in his place.

It is observable that in the case of *Southcote v. Stanley*, 1 H. & N. 247, upon which much reliance was properly placed for the defendant, Alderson, B., drew the distinction between a bare licensee and a person coming on business, and Bramwell, B., between active negligence in respect of unusual danger known to the host and not to the guest, and a bare defect of construction or repair, which the host was only negligent in not finding out or anticipating the consequence of.

There is a considerable resemblance, though not a strict analogy, between this class of cases and those founded upon the rule as to voluntary loans and gifts, that there is no remedy against the lender or giver for damage sustained from the loan or gift, except in case of unusual danger known to and concealed by the lender or giver. *Macarthy v. Younge*, 6 H. & N. 329. The case of the carboy of vitriol⁶ was one in which this court held answerable the bailor of an unusually dangerous chattel, the quality of which he knew, but did not tell the bailee, who did not know it, and who, as a proximate consequence of his not knowing, and without any fault on his part, suffered damage.

The cases referred to as to the liability for accidents to servants and persons employed in other capacities in a business or profession which necessarily and obviously exposes them to danger, as in *Seymour v. Maddox*, 16 Q. B. 326, also have their special reasons. The servant or other person so employed is supposed to undertake not only all the ordinary risks of the employment into which he enters, but also all extraordinary risks which he knows of and thinks proper to incur, including those caused by the misconduct of his fellow servants, not however including those which can be traced to mere breach

⁶ *Farrant v. Barnes* (1862) 11 C. B. (N. S.) 553, 142 Reprint, 912, 132 R. R. 667.

of duty on the part of the master. In the case of a statutory duty to fence, even the knowledge and reluctant submission of the servant who has sustained an injury, are held to be only elements in determining whether there has been contributory negligence: how far this is the law between master and servant, where there is danger known to the servant, and no statute for his protection, we need not now consider, because the plaintiff in this case was not a servant of the defendant, but the servant of the patentee. The question was adverted to, but not decided, in *Clarke v. Holmes*, 7 H. & N. 937.

The authorities respecting guests and other bare licensees, and those respecting servants and others who consent to incur a risk, being therefore inapplicable, we are to consider what is the law as to the duty of the occupier of a building with reference to persons resorting thereto in the course of business, upon his invitation, express or implied. The common case is that of a customer in a shop: but it is obvious that this is only one of a class; for, whether the customer is actually chaffering at the time, or actually buys or not, he is, according to an undoubted course of authority and practice, entitled to the exercise of reasonable care by the occupier to prevent damage from unusual danger, of which the occupier knows or ought to know, such as a trapdoor left open, unfenced, and unlighted. *Lancaster Canal Company v. Parnaby*, 11 Ad. & E. 223; per cur. *Chapman v. Rothwell*, E. B. & E. 168, where *Southcote v. Stanley*, 1 H. & N. 247 (1856) 108 R. R. 549, was cited, and the Lord Chief Justice, then Erle, J., said: "The distinction is between the case of a visitor (as the plaintiff was in *Southcote v. Stanley*), who must take care of himself, and a customer, who, as one of the public, is invited for the purposes of business carried on by the defendant." This protection does not depend upon the fact of a contract being entered into in the way of the shopkeeper's business during the stay of the customer, but upon the fact that the customer has come into the shop in pursuance of a tacit invitation given by the shopkeeper, with a view to business which concerns himself. And, if a customer were, after buying goods, to go back to the shop in order to complain of the quality, or that the change was not right, he would be just as much there upon business which concerned the shopkeeper, and as much entitled to protection during this accessory visit, though it might not be for the shopkeeper's benefit, as during the principal visit, which was. And if, instead of going himself, the customer were to send his servant, the servant would be entitled to the same consideration as the master.

The class to which the customer belongs includes persons who go not as mere volunteers, or licensees, or guests, or servants, or persons whose employment is such that danger may be considered as

bargained for, but who go upon business which concerns the occupier, and upon his invitation, express or implied.

And, with respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger, which he knows, or ought to know; and that, where there is evidence of neglect, the question whether such reasonable care has been taken, by notice, lighting, guarding, or otherwise, and whether there was contributory negligence in the sufferer, must be determined by a jury as matter of fact.

In the case of *Wilkinson v. Fairrie*, 1 H. & C. 633, relied upon for the defendant, the distinction was pointed out between ordinary accidents, such as falling down stairs, which ought to be imputed to the carelessness or misfortune of the sufferer, and accidents from unusual, covert danger, such as that of falling down into a pit.

It was ably insisted for the defendant that he could only be bound to keep his place of business in the same condition as other places of business of the like kind, according to the best-known mode of construction. And this argument seems conclusive to prove that there was no absolute duty to prevent danger, but only a duty to make the place as little dangerous as such a place could reasonably be, having regard to the contrivances necessarily used in carrying on the business. But we think the argument is inapplicable to the facts of this case: First, because it was not shown, and probably could not be, that there was any usage never to fence shafts; secondly, because it was proved that, when the shaft was not in use, a fence might be resorted to without inconvenience, and no usage could establish, that what was in fact unnecessarily dangerous was in law reasonably safe, as against persons towards whom there was a duty to be careful.

Having fully considered the notes of the Lord Chief Justice, we think there was evidence for the jury that the plaintiff was in the place by the tacit invitation of the defendant, upon business in which he was concerned; that there was by reason of the shaft unusual danger, known to the defendant; and that the plaintiff sustained damage by reason of that danger, and of the neglect of the defendant and his servants to use reasonably sufficient means to avert or warn him of it; and we cannot say that the proof of contributory negligence was so clear that we ought on this ground to set aside the verdict of the jury.

As for the argument that the plaintiff contributed to the accident by not following his guide, the answer may be that the guide, knowing the place, ought rather to have waited for him; and this point, as matter of fact, is set at rest by the verdict.

For these reasons, we think there was evidence of a cause of action in respect of which the jury were properly directed; and, as every reservation of leave to enter a nonsuit carried with it an implied con-

dition that the court may amend, if necessary, in such a manner as to raise the real question, leave ought to be given to the plaintiff, in the event of the defendant desiring to appeal or to bring a writ of error, to amend the declaration by stating the facts as proved—in effect, that the defendant was the occupier of and carried on business at the place; that there was a shaft, very dangerous to persons in the place, which the defendant knew and the plaintiff did not know; that the plaintiff, by invitation and permission of the defendant, was near the shaft, upon business of the defendant, in the way of his own craft as a gas-fitter, for hire, etc., stating the circumstances, the negligence, and that by reason thereof the plaintiff was injured. The details of the amendment can, if necessary, be settled at chambers. * * *

Rule discharged.

Against this decision of the Court of Common Pleas, the defendant appealed.

(In the Exchequer Chamber.)

KELLY, C. B. * * * The question has been raised whether the plaintiff at the time of the accident and under the special circumstances of the case was more than a mere volunteer. Let us see what the case really was. The work had been done on Saturday, and at the conclusion of it an appointment was made for the plaintiff's employer or some other workman to come on the following Tuesday to see if the work was in proper order, and all the parts of it acting rightly. The plaintiff by his master's directions went for that purpose, and I own I do not see any distinction between the case of a workman going upon the premises to perform his employer's contract, and that of his going after the contract is completed, but for a purpose incidental to the contract, and so intimately connected with it, that few contracts are completed without a similar act being done. The plaintiff went under circumstances such as those last mentioned, and he comes, therefore, strictly within the language used by Willes, J., "a person on lawful business in the course of fulfilling a contract, in which both the plaintiff and defendant have an interest."

What then is the duty imposed by law on the owner of these premises? They were used for the purpose of a sugar refinery, and it may very likely be true that such premises usually have holes in the floors of the different stories, and that they are left without any fence or safeguard during the day while the workpeople, who it may well be supposed are acquainted with the dangerous character of the premises, are about; but if a person occupying such premises enters into a contract, in the fulfillment of which workmen must come on the premises who probably do not know what is usual in such places, and are unacquainted with the danger they are likely to incur, is he not bound either to put up some fence or safeguard about the hole, or, if he does not, to give such workmen a reasonable notice that they must take

care and avoid the danger? I think the law does impose such an obligation on him. That view was taken in the judgment in the court below, where it is said: "With respect to such a visitor at least, we consider it settled law that he, using reasonable care on his part for his own safety, is entitled to expect that the occupier shall on his part use reasonable care to prevent damage from unusual danger which he knows or ought to know; and that, when there is evidence of neglect, the question whether such reasonable care has been taken by notice, lighting, guarding, or otherwise, and whether there was such contributory negligence in the sufferer, must be determined by a jury as a matter of fact."

It was so determined in this case, and though I am far from saying that there was not evidence that the plaintiff largely contributed to the accident by his own negligence, yet that was for the jury; and I think there was clearly some evidence for them that the defendant had not used reasonable precautions, and that the judge therefore would have been wrong if he had nonsuited the plaintiff.

CHANNELL, B., BLACKBURN, J., MELLOR, J., and PIGOTT, B., concurred.

Judgment affirmed.⁷

4. TO OCCUPANT OF ADJOINING PREMISES⁸

MARSHALL v. WELWOOD.

(Supreme Court of New Jersey, 1876. 38 N. J. Law, 339, 20 Am. Rep. 394.)

BEASLEY, C. J. The judge, at the trial of this cause, charged, among other matters, that as the evidence incontestably showed that one of the defendants, Welwood, was the owner of the boiler which caused the damage, he was liable in the action, unless it appeared that the same was not being run by him, or his agent, at the time of the explosion. The proposition propounded was that a person is responsible for the immediate consequences of the bursting of a steam boiler, in use by him, irrespective of any question as to negligence or want of skill on his part.

This view of the law is in accordance with the principles maintained with great learning and force of reasoning in some of the late English decisions. In this class the leading case is that of *Fletcher v. Rylands*, L. R. 1 Exch. 265, which was a suit on account of damage done by water escaping onto the premises of the plaintiff from a reservoir which the defendant had constructed with due care and skill on his

⁷ Compare *Griffen v. Manice*, *infra*, p. 336.

⁸ For discussion of principles, see Chapin on Torts, § 106.

own land. The judgment was put on a general ground, for the court said: "We think the true rule of law is that the person who, for his own purposes, brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is *prima facie* answerable for all the damage which is the natural consequence of its escape."

This result was deemed just, and was sought to be vindicated on the theory that it is but reasonable that a person who has brought something on his own property which was not naturally there, harmless to others, so long as it is confined to his own property, but which he knows to be mischievous if it gets on his neighbor's, should be obliged to make good the damage which ensues, if he does not succeed in confining it to his own property. This principle would evidently apply to, and rule, the present case; for water is no more likely to escape from a reservoir and do damage than steam is from a boiler; and, therefore, if he who collects the former force upon his property, and seeks, with care and skill, to keep it there, is answerable for his want of success, so is he who, under similar conditions, endeavors to deal with the latter. There is nothing unlawful in introducing water into a properly constructed reservoir on a person's own land, nor in raising steam in a boiler of proper quality; neither act, when performed, is a nuisance *per se*; and the inquiry consequently is whether in the doing of such lawful act the party who does it is an insurer against all flaws in the apparatus employed, no matter how secret, or unascertainable by the use of every reasonable test, such flaws may be. This English adjudication takes the affirmative side of the question, conceding, however, that the subject is not controlled by an express decision, and that it is to be investigated with reference to the general grounds of jurisprudence. I have said the doctrine involved has been learnedly treated, and the decision is of great weight, and yet its reasoning has failed to convince me of the correctness of the result to which it leads, and such result is clearly opposed to the course which judicial opinion has taken in this country. The fallacy in the process of argument by which judgment is reached in this case of *Fletcher v. Rylands*, appears to me to consist in this: That the rule mainly applicable to a class of cases which, I think, should be regarded as, in a great degree, exceptional, is amplified and extended into a general, if not universal, principle. The principal instance upon which reliance is placed is the well-known obligation of the owner of cattle to prevent them from escaping from his land and doing mischief. The law as to this point is perfectly settled, and has been settled from the earliest times, and is to the effect that the owner must take charge of his cattle at his peril, and if they evade his custody he is in some measure responsible for the consequences.

This is the doctrine of the Year Books, but I do not find that it is grounded in any theoretical principle, making a man answerable for

his acts or omissions, without regard to his culpability. That in this particular case of escaping cattle so stringent an obligation upon the owner should grow up was not unnatural. That the beasts of the landowner should be successfully restrained was a condition of considerable importance to the unmolested enjoyment of property, and the rights to plead that the escape had occurred by inevitable accident would have seriously impaired, if it did not entirely frustrate, the process of distress damage feasant. Custom has had much to do in giving shape to the law, and what is highly convenient readily runs into usage, and is accepted as a rule. It would but rarely occur that cattle would escape from a vigilant owner, and in this instance such rare exceptions seem to have passed unnoticed, for there appears to be no example of the point having been presented for judicial consideration; for the conclusion of the liability of the unnegligent owner rests in dicta, and not in express decision. But, waiving this, there is a consideration which seems to me to show that this obligation which is put upon the owner of errant cattle should not be taken to be a principle applicable, in a general way, to the use or ownership of property, which is this: That the owner of such cattle is, after all, liable only *sub modo* for the injury done by them, that is, he is responsible, with regard to tame beasts who have no exceptionally vicious disposition so far as is known, for the grass they eat and such like injuries, but not for the hurt they may inflict on the person of others—a restriction on liability which is hardly consistent with the notion that this class of cases proceeds from a principle so wide as to embrace all persons whose lawful acts produce, without fault in them, and in an indirect manner, ill results which disastrously affect innocent persons. If the principle ruling these cases was so broad as this, conformity to it would require that the person being the cause of the mischief should stand as an indemnifier against the whole of the damage. It appears to me, therefore, that this rule which applies to damage done by straying cattle was carried beyond its true bounds, when it was appealed to as proof that a person in law is answerable for the natural consequences of his acts, such acts being lawful in themselves, and having been done with proper care and skill.

The only other cases which were referred to in support of the judgment under consideration were those of a man who was sued for not keeping the wall of his privy in repair to the detriment of his neighbor, being the case of *Tenant v. Golding*, 1 Salk. 21, and several actions which it is said had been brought against the owner of some alkali works for damages alleged to have been caused by the chlorine fumes escaping from their works, which works, the case showed, had been erected upon the best scientific principles. But I am compelled to think that these cases are but a slender basis for the large structure put upon it. The case of *Tenant v. Golding* presented merely the question whether a landowner is bound in favor of his neighbor to

keep the wall of his privy in repair, and the court held that he was, and that he was responsible if, for want of such reparation, the filth escaped on the adjoining land. No question was mooted as to his liability in case the privy had been constructed with care and skill with a view to prevent the escape of its contents, and had been kept in a state of repair. Not to repair a receptacle of this kind when it was in want of repairs was, in itself, a *prima facie* case of negligence, and it seems to me that all the court decided was to hold so.

But this consideration is also to be noticed, both with respect to this last case, and that of the injurious fumes from the alkali works, that in truth they stand somewhat by themselves, and having this peculiarity: That the things in their nature partake largely of the character of nuisances. Take the alkali works as an example. Placed in a town, under ordinary circumstances, they would be a nuisance. When the attempt is made by scientific methods to prevent the escape of the fumes, it is an attempt to legalize that which is illegal, and the consequence is, it may well be held, that, failing in the attempt, the nuisance remains.

I cannot agree that, from these indications, the broad doctrine is to be drawn that a man in law is an insurer that the acts which he does, such acts being lawful and done with care, shall not injuriously affect others. The decisions cited are not so much examples of legal maxims as of exceptions to such maxims; for they stand opposed and in contrast to principles which it seems to me must be considered much more general in their operation and elementary in their nature.

The common rule, quite institutional in its character, is that in order to sustain an action for a tort, the damage complained of must have come from a wrongful act. Mr. Addison, in his work on Torts, vol. 1, p. 3, very correctly states this rule. He says: "A man may, however, sustain grievous damages at the hands of another, and yet if it be the result of the inevitable accident, or a lawful act, done in a lawful manner, without any carelessness or negligence, there is no legal injury, and no tort giving rise to an action for damages." Among other examples, he refers to an act of force, done in necessary self-defense, causing injury to an innocent bystander, which he characterizes as *damnum sine injuria*—"for no man does wrong or contracts guilt in defending himself against an aggressor." Other instances of a like kind are noted, such as the lawful obstruction of the view from the windows of dwelling houses; or the turning aside, to the detriment of another, the current of the sea or river, by means of walls or dikes. Many illustrations of the same bearing are to be found scattered through the books of reports. Thus Dyer, 25b, says: "That if a man have a dog which has killed sheep, the master of the dog being ignorant of such quality and property of the dog, the master shall not be punished for that killing." This case belongs to a numerous, well-known class where animals which are usually harmless

do damage, the decisions being that, under such conditions, the owners of the animal are not responsible. Akin to these in principle are cases of injuries done to innocent persons by horses in the charge of their owners, becoming ungovernable by reason of unexpected causes; or where a person in a dock was struck by the falling of a bale of cotton which the defendant's servants were lowering (*Scott v. London Dock Co.*, 3 H. & C. 596); or in cases of collision, either on land or sea (*Hammack v. White*, 11 C. B. [N. S.] 588).

It is true that these cases of injury done to personal property, or to persons, are, in the case of *Fletcher v. Rylands*, sought to be distinguished from other damages, on the ground that they are done in the course of traffic on the highways, whether by land or sea, which cannot be conducted without exposing those whose persons or property are near it to some inevitable risk. But this explanation is not sufficiently comprehensive, for, if a frightened horse should, in his flight, break into an inclosure, no matter how far removed from the highway, the owner would not be answerable for the damage done. Nor is the reason upon which it rests satisfactory, for, if traffic cannot be carried on without some risk, why can it not be said with the same truth that the other affairs of life, though they be transacted away from the highways, cannot be carried on without some risk; and if such risk is, in the one case, to be borne by innocent persons, why not in the other? Business done upon private property may be a part of traffic as well as that done by the means of the highway, and no reason is perceived why the same favor is not to be extended to it in both situations. But, besides this, the reason thus assigned for the immunity of him who is the unwilling producer of the damage has not been the ground on which the decisions illustrative of the rule have been put; that ground has been that the person sought to be charged had not done any unlawful act. Everywhere, in all the branches of the law, the general principle that blame must be imputable as a ground of responsibility for damages proceeding from a lawful act is apparent. A passenger is injured by the breaking of an axle of a public conveyance; the carrier is not liable, unless negligence can be shown. A man's guest is hurt by the falling of a chandelier; a suit will not lie against the host without proof that he knew, or ought to have known, of the existence of the danger. If the steam engine which did the mischief in the present case had been in use in driving a train of cars on a railroad, and had, in that situation, exploded and had inflicted injuries on travelers or bystanders, it could not have been pretended that such damage was actionable, in the absence of the element of negligence or unskillfulness. By changing the place of the accident to private property, I cannot agree that a different rule obtains.

It seems to me, therefore, that in this case it was necessary to submit the matter, as a question of fact for the jury, whether the occur-

rence doing the damage complained of was the product of pure accident or the result of want of care or skill on the part of the defendant or his agents.

This view of the subject is taken in the American decisions. A case in all respects in point is that of *Losee v. Buchanan*, 51 N. Y. 476, 10 Am. Rep. 623. The facts were essentially the same with those of the principal case. It was an action growing out of the explosion of a steam boiler upon private property, and the ruling was that such action could not be sustained without proof of fault or negligence. In that report the line of cases is so fully set out that it is unnecessary here to repeat them.

The rule should be absolute.

AINSWORTH v. LAKIN.

(Supreme Judicial Court of Massachusetts, 1902. 180 Mass. 397, 62 N. E. 746, 57 L. R. A. 132, 91 Am. St. Rep. 314.)

Action by one Ainsworth against one Lakin for damages to a stock of goods in a building which was crushed by the fall of the walls of an adjoining building, which had been partially destroyed by fire, and which had been left standing from the time of the fire on March 11th to March 27th, which was the date of the injury. Judgment in favor of the plaintiff, and the defendant brings exceptions.

KNOWLTON, J. The defendant's intestate was the owner of the land and of the first two stories of the building which stood upon it before the fire. The third story had been conveyed by the former owners to Lewis, Noble, and Laffin, trustees, to hold during the life of the building. By the fire the life of the building was destroyed, and the ownership of Lewis and others in the third story was terminated. *Ainsworth v. Mt. Moriah Lodge*, 172 Mass. 257, 52 N. E. 81. The defendant's intestate was left with his land and the walls and some other parts of the first and second stories standing upon it, and with the walls of the third story, which had previously belonged to the trustees, resting on the structure below, and connected with it as a part of the realty. All rights of other persons in the walls of the third story had come to an end. As owner of the land and of the first and second stories of the building, he was owner of everything upon it which was a part of the real estate. *Stockwell v. Hunter*, 11 Metc. 448, 45 Am. Dec. 220; *Shawmut Nat. Bank v. City of Boston*, 118 Mass. 125. His position in reference to the walls of the third story was like that of a landlord whose tenant leaves the leased land at the end of the term with structures that he has erected upon it, which have become a part of the realty. These structures which are abandoned by the tenant immediately become the property of the landlord to whose land they are affixed. *Burk v. Hollis*, 98 Mass. 55; *Madigan v. McCarthy*, 108 Mass. 376, 11 Am. Rep. 371; *Watriss v. Bank*, 124 Mass. 571, 26 Am.

Rep. 694; *McIver v. Estabrook*, 134 Mass. 550. As owner of the land and the structures upon it, which were subject to the power of gravitation, and likely to do injury to others if they fell, the defendant's intestate owed certain duties to adjacent landowners. His duty immediately after the fire was affected by the fact that until then he had had no ownership or control of the upper part of the wall, and that the condition of the whole had been greatly changed by the effect of the fire and the destruction of the connected parts. For dangers growing out of changes which he could not prevent he was not immediately liable. *Gray v. Gaslight Co.*, 114 Mass. 149, 19 Am. Rep. 324; *Mahoney v. Libbey*, 123 Mass. 20, 25 Am. Rep. 6. The jury were therefore rightly instructed that, before a liability could grow up against the defendant's intestate after the fire, he was entitled to a reasonable time to make necessary investigation and to take such precautions as were required to prevent the wall from doing harm.

We come next to the question, "What was his duty and what was his liability after the lapse of such a reasonable time?" There is a class of cases in which it is held that one who, for his own purposes, brings upon his land noxious substances or other things which have a tendency to escape and do great damage, is bound at his peril to confine them and keep them on his own premises. This rule is rightly applicable only to such unusual and extraordinary uses of property in reference to the benefits to be derived from the use and the dangers or losses to which others are exposed as should not be permitted except at the sole risk of the user. The standard of duty established by the courts in these cases is that every owner shall refrain from these unwarrantable and extremely dangerous uses of property unless he provides safeguards whose perfection he guaranties. The case of *Rylands v. Fletcher*, L. R. 3 H. L. 330; *Id.*, L. R. 1 Exch. 267—rests upon this principle. In this commonwealth the rule has been applied to the keeping of manure in a vault very near the well and the cellar of a dwelling house of an adjacent owner. *Ball v. Nye*, 99 Mass. 582, 97 Am. Dec. 56. See, also, *Fitzpatrick v. Welch*, 174 Mass. 486, 55 N. E. 178, 48 L. R. A. 278. That there are uses of property not forbidden by law to which this doctrine properly may be applied is almost universally acknowledged. This rule is not applicable to the construction and maintenance of the walls of an ordinary building near the land of an adjacent owner. In *Quinn v. Crimmings*, 171 Mass. 255-258, 50 N. E. 624, 626, 42 L. R. A. 101, 68 Am. St. Rep. 420, Mr. Justice Holmes shows that in reference to the danger from the falling of a structure erected on land "the decision as to what precautions are proper naturally may vary with the nature of the particular structure." He says: "As it is desirable that buildings and fences should be put up, the law of this commonwealth does not throw the risk of that act, any more than of other necessary conduct, upon the actor, or make every owner of a structure insure against all that may happen, however little to be foreseen." The principle applicable to the erection of common build-

ings whose fall might do damage to persons or property on the adjacent premises holds owners to a less strict duty. This principle is that, where a certain lawful use of property will bring to pass wrongful consequences from the condition in which the property is put, if these are not guarded against, an owner who makes such a use is bound at his peril to see that proper care is taken in every particular to prevent the wrong. *Woodman v. Railroad Co.*, 149 Mass. 335, 21 N. E. 482, 4 L. R. A. 213, 14 Am. St. Rep. 427, and cases cited; *Curtis v. Kiley*, 153 Mass. 123, 26 N. E. 421; *Pye v. Faxon*, 156 Mass. 471, 31 N. E. 640; *Harding v. City of Boston*, 163 Mass. 14-19, 39 N. E. 411, and cases cited; *Cabot v. Kingman*, 166 Mass. 403-406, 44 N. E. 344, 33 L. R. A. 45; *Robbins v. Atkins*, 168 Mass. 45, 46 N. E. 425; *Thompson v. Railway Co.*, 170 Mass. 577, 49 N. E. 913, 40 L. R. A. 345, 64 Am. St. Rep. 323; *Quinn v. Crimmings*, 171 Mass. 255, 256, 50 N. E. 624, 42 L. R. A. 101, 68 Am. St. Rep. 420; *Boomer v. Wilbur*, 176 Mass. 482, 57 N. E. 1004, 53 L. R. A. 172; *Sessengut v. Posey*, 67 Ind. 408, 33 Am. Rep. 98; *City of Anderson v. East*, 117 Ind. 126, 19 N. E. 726, 2 L. R. A. 712, 10 Am. St. Rep. 35; *City of Chicago v. Robbins*, 2 Black, 418-428, 17 L. Ed. 298; *Homan v. Stanley*, 66 Pa. 464, 5 Am. Rep. 389; *Mayor, etc., v. Bailey*, 2 Denio (N. Y.) 433; *Bower v. Peate*, 1 Q. B. Div. 321; *Tarry v. Ashton*, Id. 314; *Gray v. Pullen*, 5 Best & S. 970-981; *Dalton v. Angus*, 6 App. Cas. 740, 829. The duty which the law imposes upon an owner of real estate in such a case is to make the conditions safe so far as it can be done by the exercise of ordinary care on the part of all those engaged in the work. He is responsible for the negligence of independent contractors as well as for that of his servants. This rule is applicable to every one who builds an ordinary wall which is liable to do serious injury by falling outside of his own premises. It is the rule on which the decision in *Gorham v. Gross*, 125 Mass. 232, 28 Am. Rep. 224, rests, and the case is not an authority for any liability of a landowner that goes beyond this. See, also, *Gray v. Harris*, 107 Mass. 492, 9 Am. Rep. 61; *Inhabitants of Shrewsbury v. Smith*, 12 Cush. 177. The uses of property governed by this rule are those that bring new conditions which involve risks to the persons or property of others, but which are ordinary and usual, and, in a sense, natural, as incident to the ownership of the land. The rule first referred to applies to unusual and extraordinary uses which are so fraught with peril to others that the owner should not be permitted to adopt them for his own purposes without absolutely protecting his neighbors from injury or loss by reason of the use. In England this rule, which was laid down in *Rylands v. Fletcher*, *supra*, in reference to a reservoir of water, has since been held to be inapplicable where the collection of the water is in the natural and ordinary use of the land. *Fletcher v. Smith*, 2 App. Cas. 781. See *Carstairs v. Taylor*, L. R. 6 Exch. 217. So far as we know, there is no case in

which it has been applied to the erection or maintenance of the walls of an ordinary building.

The construction which should be put upon the judge's charge in regard to liability for standing walls is by no means certain. Some broad statements in it might seem to indicate that he was laying down a rule applicable to the construction and maintenance of walls of ordinary buildings so situated that if they fall they will be likely to injure the property of the adjacent owner. If this were the true meaning, the instructions would be wrong. But, taking the charge in its different parts in connection with the facts stated in the bill of exceptions, we think it was intended to state the rule applicable to the kind of wall that the jury were considering, and not to the walls of buildings generally. As was decided in a previous suit brought by this plaintiff, the life of the building had been destroyed by fire, and the walls which subsequently fell were no longer used in supporting a building. *Ainsworth v. Mt. Moriah Lodge*, 172 Mass. 257, 52 N. E. 81. Not only was this the testimony of the plaintiff's witnesses, but it was the substance of the evidence introduced by the defendant. His experts testified that, before any part of the wall could safely be built upon, the third story, at least, would have to be taken down. This upper part of the wall was that which was most in danger of falling, and the part whose fall would be most likely to do damage. To maintain it, or to leave it standing to its full height, could serve no useful purpose. Its condition in reference to fitness for use was an undisputed fact on the evidence. Instead of being a part of a building adapted to occupation, it was a part of the ruins of a building. To maintain such a wall after the expiration of a reasonable time for investigation and for its removal would not be a reasonable and proper use of one's property. It was the duty of the defendant not to suffer such a wall to remain on his land, where its fall would injure his neighbor, without using such care in the maintenance of it as would absolutely prevent injuries, except from causes over which he would have no control, such as vis major, acts of public enemies, or wrongful acts of third persons which human foresight could not reasonably be expected to anticipate and prevent. This was the rule of law stated by the judge to the jury. With this construction of the charge we think that the jury were rightly directed to a consideration of the evidence on the principal issue of fact. * * *

Exceptions overruled.

⁹ The remainder of the opinion is omitted.

II. Duty of Maker or Vendor of Chattel¹⁰

MacPHERSON v. BUICK MOTOR Co.

(Court of Appeals of New York, 1916. 217 N. Y. 382, 111 N. E. 1050.)

CARDOZO, J. The defendant is a manufacturer of automobiles. It sold an automobile to a retail dealer. The retail dealer resold to the plaintiff. While the plaintiff was in the car it suddenly collapsed. He was thrown out and injured. One of the wheels was made of defective wood, and its spokes crumbled into fragments. The wheel was not made by the defendant; it was bought from another manufacturer. There is evidence, however, that its defects could have been discovered by reasonable inspection, and that inspection was omitted. There is no claim that the defendant knew of the defect and willfully concealed it. The case, in other words, is not brought within the rule of *Kuelling v. Lean Mfg. Co.*, 183 N. Y. 78, 75 N. E. 1098, 2 L. R. A. (N. S.) 303, 111 Am. St. Rep. 691, 5 Ann. Cas. 124. The charge is one, not of fraud, but of negligence. The question to be determined is whether the defendant owed a duty of care and vigilance to any one but the immediate purchaser.

The foundations of this branch of the law, at least in this state, were laid in *Thomas v. Winchester*, 6 N. Y. 397, 57 Am. Dec. 455. A poison was falsely labeled. The sale was made to a druggist, who in turn sold to a customer. The customer recovered damages from the seller who affixed the label. "The defendant's negligence," it was said, "put human life in imminent danger." A poison, falsely labeled, is likely to injure any one who gets it. Because the danger is to be foreseen, there is a duty to avoid the injury. Cases were cited by way of illustration in which manufacturers were not subject to any duty irrespective of contract. The distinction was said to be that their conduct, though negligent, was not likely to result in injury to any one except the purchaser. We are not required to say whether the chance of injury was always as remote as the distinction assumes. Some of the illustrations might be rejected to-day. The principle of the distinction is, for present purposes, the important thing. *Thomas v. Winchester* became quickly a landmark of the law. In the application of its principle there may, at times, have been uncertainty or even error. There has never in this state been doubt or disavowal of the principle itself. The chief cases are well known, yet to recall some of them will be helpful. *Loop v. Litchfield*, 42 N. Y. 351, 1 Am. Rep. 513, is the earliest. It was the case of a defect in a small balance wheel used on a circular saw. The manufacturer pointed out the defect to the buyer, who wished a cheap

¹⁰ For discussion of principles, see Chapin on Torts, § 107.

article and was ready to assume the risk. The risk can hardly have been an imminent one, for the wheel lasted five years before it broke. In the meanwhile the buyer had made a lease of the machinery. It was held that the manufacturer was not answerable to the lessee. *Loop v. Litchfield* was followed in *Losee v. Clute*, 51 N. Y. 494, 10 Am. Rep. 638, the case of the explosion of a steam boiler. That decision has been criticized (Thompson on Negligence, 233; Shearman & Redfield on Negligence [6th Ed.] § 117); but it must be confined to its special facts. It was put upon the ground that the risk of injury was too remote. The buyer in that case had not only accepted the boiler, but had tested it. The manufacturer knew that his own test was not the final one. The finality of the test has a bearing on the measure of diligence owing to persons other than the purchaser. Beven, Negligence (3d Ed.) pp. 50, 51, 54; Wharton, Negligence (2d Ed.) § 134.

These early cases suggest a narrow construction of the rule. Later cases, however, evince a more liberal spirit. First in importance is *Devlin v. Smith*, 89 N. Y. 470, 42 Am. Rep. 311. The defendant, a contractor, built a scaffold for a painter. The painter's servants were injured. The contractor was held liable. He knew that the scaffold, if improperly constructed, was a most dangerous trap. He knew that it was to be used by the workmen. He was building it for that very purpose. Building it for their use, he owed them a duty, irrespective of his contract with their master, to build it with care.

From *Devlin v. Smith* we pass over intermediate cases and turn to the latest case in this court in which *Thomas v. Winchester* was followed. That case is *Statler v. Ray Mfg. Co.*, 195 N. Y. 478, 480, 88 N. E. 1063. The defendant manufactured a large coffee urn. It was installed in a restaurant. When heated, the urn exploded and injured the plaintiff. We held that the manufacturer was liable. We said that the urn "was of such a character inherently that, when applied to the purposes for which it was designed, it was liable to become a source of great danger to many people if not carefully and properly constructed."

It may be that *Devlin v. Smith* and *Statler v. Ray Mfg. Co.* have extended the rule of *Thomas v. Winchester*. If so, this court is committed to the extension. The defendant argues that things imminently dangerous to life are poisons, explosives, deadly weapons—things whose normal function it is to injure or destroy. But whatever the rule in *Thomas v. Winchester* may once have been, it has no longer that restricted meaning. A scaffold (*Devlin v. Smith*, supra) is not inherently a destructive instrument. It becomes destructive only if imperfectly constructed. A large coffee urn (*Statler v. Ray Mfg. Co.*, supra) may have within itself, if negligently made, the potency of danger, yet no one thinks of it as an implement whose normal function is destruction. What is true of the coffee urn is equally true of bottles of aerated water. *Torgesen v. Schultz*, 192 N. Y. 156, 84 N. E. 956, 18 L. R. A. (N. S.) 726, 127 Am. St. Rep. 894. We have mentioned

only cases in this court. But the rule has received a like extension in our courts of intermediate appeal. In *Burke v. Ireland*, 26 App. Div. 487, 50 N. Y. Supp. 369, in an opinion by Cullen, J., it was applied to a builder who constructed a defective building; in *Kahner v. Otis Elevator Co.*, 96 App. Div. 169, 89 N. Y. Supp. 185, to the manufacturer of an elevator; in *Davies v. Pelham Hod Elevating Co.*, 65 Hun, 573, 20 N. Y. Supp. 523, affirmed in this court without opinion, 146 N. Y. 363, 41 N. E. 88, to a contractor who furnished a defective rope with knowledge of the purpose for which the rope was to be used. We are not required at this time either to approve or to disapprove the application of the rule that was made in these cases. It is enough that they help to characterize the trend of judicial thought.

Devlin v. Smith was decided in 1882. A year later a very similar case came before the Court of Appeal in England (*Heaven v. Pender*, 11 Q. B. D. 503). We find in the opinion of Brett, M. R., afterwards Lord Esher, the same conception of a duty, irrespective of contract, imposed upon the manufacturer by the law itself:

"Whenever one person supplies goods or machinery, or the like, for the purpose of their being used by another person under such circumstances that every one of ordinary sense would, if he thought, recognize at once that unless he used ordinary care and skill with regard to the condition of the thing supplied, or the mode of supplying it, there will be danger of injury to the person or property of him for whose use the thing is supplied, and who is to use it, a duty arises to use ordinary care and skill as to the condition or manner of supplying such thing."

He then points out that for a neglect of such ordinary care or skill whereby injury happens, the appropriate remedy is an action for negligence. The right to enforce this liability is not to be confined to the immediate buyer. The right, he says, extends to the persons or class of persons for whose use the thing is supplied. It is enough that the goods "would in all probability be used at once * * * before a reasonable opportunity for discovering any defect which might exist," and that the thing supplied is of such a nature "that a neglect of ordinary care or skill as to its condition or the manner of supplying it would probably cause danger to the person or property of the person for whose use it was supplied, and who was about to use it." On the other hand, he would exclude a case "in which the goods are supplied under circumstances in which it would be a chance by whom they would be used or whether they would be used or not, or whether they would be used before there would probably be means of observing any defect," or where the goods are of such a nature that "a want of care or skill as to their condition or the manner of supplying them would not probably produce danger of injury to person or property." What was said by Lord Esher in that case did not command the full assent of his associates. His opinion has been criticized "as requiring every man to take affirmative precautions to protect his neighbors as well as

to refrain from injuring them." Bohlen, *Affirmative Obligations in the Law of Torts*, 44 Am. Law Reg. (N. S.) 341. It may not be an accurate exposition of the law of England. Perhaps it may need some qualification even in our own state. Like most attempts at comprehensive definition, it may involve errors of inclusion and of exclusion. But its tests and standards, at least in their underlying principles, with whatever qualification may be called for as they are applied to varying conditions, are the tests and standards of our law.

We hold, then, that the principle of *Thomas v. Winchester* is not limited to poisons, explosives, and things of like nature, to things which in their normal operation are implements of destruction. If the nature of a thing is such that it is reasonably certain to place life and limb in peril when negligently made, it is then a thing of danger. Its nature gives warning of the consequences to be expected. If to the element of danger there is added knowledge that the thing will be used by persons other than the purchaser, and used without new tests, then, irrespective of contract, the manufacturer of this thing of danger is under a duty to make it carefully. That is as far as we are required to go for the decision of this case. There must be knowledge of a danger, not merely possible, but probable. It is possible to use almost anything in a way that will make it dangerous if defective. That is not enough to charge the manufacturer with a duty independent of his contract. Whether a given thing is dangerous may be sometimes a question for the court and sometimes a question for the jury. There must also be knowledge that in the usual course of events the danger will be shared by others than the buyer. Such knowledge may often be inferred from the nature of the transaction. But it is possible that even knowledge of the danger and of the use will not always be enough. The proximity or remoteness of the relation is a factor to be considered. We are dealing now with the liability of the manufacturer of the finished product, who puts it on the market to be used without inspection by his customers. If he is negligent, where danger is to be foreseen, a liability will follow.

We are not required, at this time, to say that it is legitimate to go back of the manufacturer of the finished product and hold the manufacturers of the component parts. To make their negligence a cause of imminent danger, an independent cause must often intervene; the manufacturer of the finished product must also fail in his duty of inspection. It may be that in those circumstances the negligence of the earlier members of the series is too remote to constitute, as to the ultimate user, an actionable wrong. Beven on Negligence (3d Ed.) 50, 51, 54; Wharton on Negligence (2d Ed.) § 134; *Leeds v. N. Y. Tel. Co.*, 178 N. Y. 118, 70 N. E. 219; *Sweet v. Perkins*, 196 N. Y. 482, 90 N. E. 50; *Hayes v. Hyde Park*, 153 Mass. 514, 516, 27 N. E. 522, 12 L. R. A. 249. We leave that question open. We shall have to deal with it when it arises. The difficulty which it suggests is not present in this case. There is here no break in the chain of cause and effect.

In such circumstances, the presence of a known danger, attendant upon a known use, makes vigilance a duty. We have put aside the notion that the duty to safeguard life and limb, when the consequences of negligence may be foreseen, grows out of contract and nothing else. We have put the source of the obligation where it ought to be. We have put its source in the law.

From this survey of the decisions, there thus emerges a definition of the duty of a manufacturer which enables us to measure this defendant's liability. Beyond all question, the nature of an automobile gives warning of probable danger if its construction is defective. This automobile was designed to go 50 miles an hour. Unless its wheels were sound and strong, injury was almost certain. It was as much a thing of danger as a defective engine for a railroad. The defendant knew the danger. It knew also that the car would be used by persons other than the buyer. This was apparent from its size; there were seats for three persons. It was apparent also from the fact that the buyer was a dealer in cars, who bought to resell. The maker of this car supplied it for the use of purchasers from the dealer just as plainly as the contractor in *Devlin v. Smith* supplied the scaffold for use by the servants of the owner. The dealer was indeed the one person of whom it might be said with some approach to certainty that by him the car would not be used. Yet the defendant would have us say that he was the one person whom it was under a legal duty to protect. The law does not lead us to so inconsequent a conclusion. Precedents drawn from the days of travel by stagecoach do not fit the conditions of travel to-day. The principle that the danger must be imminent does not change, but the things subject to the principle do change. They are whatever the needs of life in a developing civilization require them to be.

In reaching this conclusion, we do not ignore the decisions to the contrary in other jurisdictions. It was held in *Cadillac Co. v. Johnson*, 221 Fed. 801, 137 C. C. A. 279, L. R. A. 1915E, 287, that an automobile is not within the rule of *Thomas v. Winchester*. There was, however, a vigorous dissent. Opposed to that decision is one of the Court of Appeals of Kentucky. *Olds Motor Works v. Shaffer*, 145 Ky. 616, 140 S. W. 1047, 37 L. R. A. (N. S.) 560, Ann. Cas. 1913B, 689. The earlier cases are summarized by Judge Sanborn in *Huset v. J. I. Case Threshing Machine Co.*, 120 Fed. 865, 57 C. C. A. 237, 61 L. R. A. 303. Some of them, at first sight inconsistent with our conclusion, may be reconciled upon the ground that the negligence was too remote, and that another cause had intervened. But even when they cannot be reconciled, the difference is rather in the application of the principle than in the principle itself. Judge Sanborn says, for example, that the contractor who builds a bridge, or the manufacturer who builds a car, cannot ordinarily foresee injury to other persons than the owner as the probable result. 120 Fed. 865, at page 867, 57 C. C. A. 237, at page 239, 61 L. R. A. 303. We take a different view.

We think that injury to others is to be foreseen not merely as a possible, but as an almost inevitable, result. See the trenchant criticism in Bohlen, *supra*, at page 351. Indeed, Judge Sanborn concedes that his view is not to be reconciled with our decision in *Devlin v. Smith*, *supra*. The doctrine of that decision has now become the settled law of this state, and we have no desire to depart from it.

In England the limits of the rule are still unsettled. *Winterbottom v. Wright*, 10 M. & W. 109, is often cited. The defendant undertook to provide a mail coach to carry the mail bags. The coach broke down from latent defects in its construction. The defendant, however, was not the manufacturer. The court held that he was not liable for injuries to a passenger. The case was decided on a demurrer to the declaration. Lord Esher points out in *Heaven v. Pender*, *supra*, at page 513, that the form of the declaration was subject to criticism. It did not fairly suggest the existence of a duty aside from the special contract which was the plaintiff's main reliance. See the criticism of *Winterbottom v. Wright*, in Bohlen, *supra*, at pages 281, 283. At all events, in *Heaven v. Pender*, *supra*, the defendant, a dock owner, who put up a staging outside a ship, was held liable to the servants of the shipowner. In *Elliot v. Hall*, 15 Q. B. D. 315, the defendant sent out a defective truck laden with goods which he had sold. The buyer's servants unloaded it, and were injured because of the defects. It was held that the defendant was under a duty "not to be guilty of negligence with regard to the state and condition of the truck." There seems to have been a return to the doctrine of *Winterbottom v. Wright* in *Earl v. Lubbock*, [1905] 1 K. B. 253. In that case, however, as in the earlier one, the defendant was not the manufacturer. He had merely made a contract to keep the van in repair. A later case (*White v. Steadman*, [1913] 3 K. B. 340, 348) emphasizes that element. A livery stable keeper who sent out a vicious horse was held liable, not merely to his customer, but also to another occupant of the carriage, and *Thomas v. Winchester* was cited and followed. *White v. Steadman*, *supra*, at pages 348, 349. It was again cited and followed in *Dominion Natural Gas Co. v. Collins*, [1909] A. C. 640, 646. From these cases a consistent principle is with difficulty extracted. The English courts, however, agree with ours in holding that one who invites another to make use of an appliance is bound to the exercise of reasonable care. *Caledonian Ry. Co. v. Mulholland*, [1898] A. C. 216, 227; *Inderman v. Dames*, L. R. [1 C. P.] 274. That at bottom is the underlying principle of *Devlin v. Smith*. The contractor who builds the scaffold invites the owner's workmen to use it. The manufacturer who sells the automobile to the retail dealer invites the dealer's customers to use it. The invitation is addressed in the one case to determinate persons and in the other to an indeterminate class, but in each case it is equally plain, and in each its consequences must be the same.

There is nothing anomalous in a rule which imposes upon A., who has contracted with B., a duty to C. and D. and others according as

he knows or does not know that the subject-matter of the contract is intended for their use. We may find an analogy in the law which measures the liability of landlords. If A. leases to B. a tumble-down house, he is not liable, in the absence of fraud, to B.'s guests who enter it and are injured. This is because B. is then under the duty to repair it, the lessor has the right to suppose that he will fulfill that duty, and, if he omits to do so, his guests must look to him. Bohlen, *supra*, at page 276. But if A. leases a building to be used by the lessee at once as a place of public entertainment, the rule is different. There injury to persons other than the lessee is to be foreseen, and foresight of the consequences involves the creation of a duty. *Junkermann v. Tilyou R. Co.*, 213 N. Y. 404, 108 N. E. 190, L. R. A. 1915F, 700, and cases there cited.

In this view of the defendant's liability there is nothing inconsistent with the theory of liability on which the case was tried. It is true that the court told the jury that "an automobile is not an inherently dangerous vehicle." The meaning, however, is made plain by the context. The meaning is that danger is not to be expected when the vehicle is well constructed. The court left it to the jury to say whether the defendant ought to have foreseen that the car, if negligently constructed, would become "imminently dangerous." Subtle distinctions are drawn by the defendant between things inherently dangerous and things imminently dangerous, but the case does not turn upon these verbal niceties. If danger was to be expected as reasonably certain, there was a duty of vigilance, and this whether you call the danger inherent or imminent. In varying forms that thought was put before the jury. We do not say that the court would not have been justified in ruling as a matter of law that the car was a dangerous thing. If there was any error, it was none of which the defendant can complain.

We think the defendant was not absolved from a duty of inspection because it bought the wheels from a reputable manufacturer. It was not merely a dealer in automobiles. It was a manufacturer of automobiles. It was responsible for the finished product. It was not at liberty to put the finished product on the market without subjecting the component parts to ordinary and simple tests. *Richmond & Danville R. R. Co. v. Elliott*, 149 U. S. 266, 272, 13 Sup. Ct. 837, 37 L. Ed. 728. Under the charge of the trial judge nothing more was required of it. The obligation to inspect must vary with the nature of the thing to be inspected. The more probable the danger the greater the need of caution.

There is little analogy between this case and *Carlson v. Phoenix Bridge Co.*, 132 N. Y. 273, 30 N. E. 750, where the defendant bought a tool for a servant's use. The making of tools was not the business in which the master was engaged. Reliance on the skill of the manufacturer was proper and almost inevitable. But that is not the defend-

ant's situation. Both by its relation to the work and by the nature of its business, it is charged with a stricter duty.

Other rulings complained of have been considered, but no error has been found in them.

HISCOCK, CHASE, and CUDDEBACK, JJ., concur with CARDOZO, J., and HOGAN, J., concurs in result. WILLARD BARTLETT, C. J., reads dissenting opinion. POUND, J., not voting.

III. Duty of Keeper of Animals ¹¹

FILBURN v. PEOPLE'S PALACE & AQUARIUM CO., Limited.

(In the Court of Appeal, 1890. 25 Q. B. Div. 258.)

The action was brought to recover damages for injuries sustained by the plaintiff by his being attacked by an elephant, which was the property of the defendants, and was being exhibited by them. The learned judge left three questions to the jury: whether the elephant was an animal dangerous to man; whether the defendant knew the elephant to be dangerous; and whether the plaintiff brought the attack on himself. The jury answered all three questions in the negative. The learned judge entered judgment for the plaintiff for a sum agreed upon in case the plaintiff should be entitled to recover.

The defendants appealed.

Lord ESHER, M. R. The only difficulty I feel in the decision of this case is whether it is possible to enunciate any formula under which this and similar cases may be classified. The law of England recognizes two distinct classes of animals; and as to one of those classes, it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury, and it is immaterial whether he knows it to be dangerous or not. As to another class, the law assumes that animals belonging to it are not of a dangerous nature, and any one who keeps an animal of this kind is not liable for the damage it may do, unless he knew that it was dangerous. What, then, is the best way of dealing generally with these different cases? I suppose there can be no dispute that there are some animals that every one must recognize as not being dangerous on account of their nature. Whether they are *feræ naturæ* so far as rights of property are concerned is not the question; they certainly are not so in the sense that they are dangerous. There is another set of animals that the law has recognized in England as not being of a dangerous nature, such as sheep, horses, oxen, dogs, and others that I will not attempt to enumerate. I take it this recognition has come about from the fact that years

¹¹ For discussion of principles, see Chapin on Torts, § 108.

ago, and continuously to the present time, the progeny of these classes has been found by experience to be harmless, and so the law assumes the result of this experience to be correct without further proof. Unless an animal is brought within one of these two descriptions,—that is, unless it is shown to be either harmless by its very nature, or to belong to a class that has become so by what may be called cultivation,—it falls within the class of animals as to which the rule is, that a man who keeps one must take the responsibility of keeping it safe. It cannot possibly be said that an elephant comes within the class of animals known to be harmless by nature, or within that shewn by experience to be harmless in this country, and consequently it falls within the class of animals that a man keeps at his peril, and which he must prevent from doing injury under any circumstances, unless the person to whom the injury is done brings it on himself. It was, therefore, immaterial in this case whether the particular animal was a dangerous one, or whether the defendants had any knowledge that it was so. The judgment entered was in these circumstances right, and the appeal must be dismissed.

LINDLEY, L. J. I am of the same opinion. The last case of this kind discussed was *May v. Burdett*, [1846] 9 Q. B. 101, but there the monkey which did the mischief was said to be accustomed to attack mankind, to the knowledge of the person who kept it. That does not decide the case. We have no case cited to us, nor any evidence to show that elephants in this country are not as a class dangerous; nor are they commonly known here to belong to the class of domesticated animals. Therefore a person who keeps one is liable, though he does not know that the particular one that he keeps is mischievous. Applying that principle to this case, it appears that the judgment for the plaintiff was right, and this appeal must be dismissed.

BOWEN, L. J. I am of the same opinion. The broad principle that governs this case is that laid down in *Fletcher v. Rylands*, L. R. 3 H. L. 330, that a person who brings upon his land anything that would not naturally come upon it, and which is in itself dangerous, must take care that it is kept under proper control. The question of liability for damage done by mischievous animals is a branch of that law which has been applied in the same way from the time of Lord Holt and of Hale until now. People must not be wiser than the experience of mankind. If from the experience of mankind a particular class of animals is dangerous, though individuals may be tamed, a person who keeps one of the class takes the risk of any damage it may do. If, on the other hand, the animal kept belongs to a class which, according to the experience of mankind, is not dangerous, and not likely to do mischief, and if the class is dealt with by mankind on that footing, a person may safely keep such an animal unless he knows that the particular animal that he keeps is likely to do mischief. It cannot be doubted that elephants, as a class, have not been reduced to a state of subjection; they still remain wild and untamed, though individuals are brought to a de-

gree of tameness which amounts to domestication. A person, therefore, who keeps an elephant, does so at his own risk, and an action can be maintained for any injury done by it, although the owner had no knowledge of its mischievous propensities. I agree, therefore, that the appeal must be dismissed.¹²

IV. Standard of Care¹³

GALVESTON CITY R. CO. v. HEWITT.

(Supreme Court of Texas, 1887. 67 Tex. 473, 3 S. W. 705, 60 Am. Rep. 32.)

This suit was brought in the name of appellee, an infant nineteen months old at the date of the injury complained of. He was run over by a street car of appellant in a public street in Galveston between four and five o'clock in the daytime, and by a car under the control of one of appellant's employes.

STAYTON, Associate Justice.¹⁴ The charge of the court complained of in the second assignment was correct, and there was evidence which made the charge applicable to the case. The appellee, a child nineteen months of age, was seen on the track of appellant's street railway, in advance of an approaching car, which ran over him. Whether the driver saw the child does not appear, but the inference, from the fact that he did not stop the car until he had reached the next corner after running over the child, is that he did not.

The only person who testified in the case, that saw the accident at the distance of about one hundred feet from the approaching car, saw the child on the track between himself and the car, and gave a warning cry of danger, which was unheard or unheeded. The driver was on the car, but whether at his post or inside of the car is left in doubt. The animal drawing the car seems to have seen the danger, which the driver ought to have seen, and ran off to one side of the track.

The accident occurred in a public street about four or five o'clock on a bright afternoon. The charge given without request made the right of the appellee to recover to depend upon the fact that his injury resulted from the negligence of the driver, and it assumed no fact. It informed the jury that "negligence is the want of such care and prudence as prudent persons observe under similar circumstances, and negligence is a question of fact to be proved just as any other fact," and that the burden of proving its existence rested upon the plaintiff.

¹² Compare *Le Forest v. Tolman*, *supra*, p. 123.

¹³ For discussion of principles, see Chapin on Torts, §§ 109-111.

¹⁴ The statement of facts is abridged and a portion of the opinion is omitted.

At the request of the defendant the court gave the following instructions: "If you believe from the evidence that the plaintiff was injured by being run over by the car, you will find for the defendant, unless it appears to your satisfaction that the running over of the plaintiff by the car was by reason of the negligence of the driver. If you believe, from the evidence that the plaintiff was injured, but do not believe that such injury resulted from the plaintiff being run over by the car, you will find for the defendant."

The brief and argument for appellant assert that the charge "absolutely assumes, presupposes, that the plaintiff was injured by the defendant, and that the injury was due to defendant's negligence." The charges contain no such assumptions, and are remarkably free from such defects.

At request of counsel for appellee the court instructed the jury as follows: "The jury are instructed that it was the duty of the defendant company to exercise the highest degree of diligence towards a child of tender years and without discretion, and that slight negligence would make defendant company liable in damages." This charge is assigned as error.

Since the case of *Coggs v. Bernard* [2 Ld. Raym. 909] three degrees or grades of negligence with their equivalent grades of diligence have been recognized by English and American text-writers, and by the courts; but, however correct in theory the classification may be, the utmost difficulty has been found by the courts in applying it to the ordinary affairs of life; and many of the most learned have regretted their recognition, while all, in the actual adjudication of cases, have more or less ignored the classification. While to the mind of the learned jurist, trained to theoretical refinements and capable of making nice distinctions, grounds on which the grades may stand may be perceived, yet the same minds, when called upon to apply the theories to the facts of given cases, will be unable to fix the point in fact at which the one grade ceases to exist, and another begins.

Theories which cannot be given a practical effect, even by those most skilled in technically correct theorizing, certainly ought not to be given much weight in the adjudication of the multiform affairs of life, which must be conducted through persons of ordinary intelligence largely, without any theoretical or technical learning.

When a person inadvertently omits or fails to do some act required in the discharge of a legal duty to another, whether such duty arises from contract or from the nature of the employment in which the person is engaged, then such an omission constitutes actionable negligence, if as an ordinary or natural sequence it produces damage to another.

The omission may be classified as gross or slight negligence or simply as negligence, or as failure to use the highest, ordinary or slight degree of diligence, but the legal obligation, at all events, to make compensation to the injured person, exists if the omission was a breach of

duty and the proximate cause of the injury. What facts will constitute that diligence which the law requires must depend on the circumstances of each particular case. The omission must be considered in relation to the business in which the person, whose duty it is to exercise care, is engaged.

If the business be one hazardous to the lives of others, the care to be used must be of a nature more exacting than required where no such hazard exists; the greater the hazard the more complete must be the exercise of care.

The exercise of that care requisite to the discharge of a legal duty towards an adult person of intelligence, and not wanting in physical ability to take care of himself, if exercised towards a child of tender years, wanting in intelligence and ability to take care of itself, would often amount to what is usually termed gross negligence. A railway carrier of passengers may, without subjecting itself to the charge of negligence, permit an adult passenger to pass and repass from one passenger car to another while in motion, or to select his own seat or position in a car, if there be not some danger in the position not open to the observation of the passenger; but were an infant of tender years and without discretion, traveling with its parents, to escape from their control, and to attempt to do the same things, it would evidently be the duty of the servants of the carrier, if they knew of it, to restrain the acts of the infant in these respects, or any other from which injury to it was likely to result; and a failure to do so would be negligence, which would render the carrier liable for any injury that might result from such neglect.

It is frequently said that a carrier of passengers is bound to exercise a high degree of care for their safety; and that for an injury resulting to them from what is termed negligence or slight negligence, the carrier will be liable; and that the duty to exercise extreme care results from the contract of carriage, express or implied. This is true, but it is not the whole truth, for the duty arises from the hazardous character of the business, and the fact that human life is imperiled by it. The contract creates the relation of carrier and passenger, but that is not the main source from which springs the duty of the carrier to exercise a high degree of care.

It has sometimes been said that a carrier owes no duty to persons other than passengers and employés, other than that it must not intentionally, willfully, or wantonly injure them. This doctrine has not been sanctioned in this state.

Ordinary railway companies, running cars propelled by steam, have the exclusive right to the use of their tracks, except at such places as they are intersected by public crossings or such private ways as they may permit, and they may therefore expect that no one will violate this right, and may rely upon a clear track, but it is very generally held that, notwithstanding this, such is the hazardous nature of the business in which they are engaged, it is the duty of such carriers, not

only for the safety of their passengers, but for the safety of any one who may be on the track, to keep a look out. Street railways have no exclusive right to the use of the part of a street covered by their track, but all persons have the right to use the street for the purposes for which streets are ordinarily used, and, from this fact, such companies may expect that other persons will use the street, as they have the right to do, and it is therefore incumbent upon them to ascertain whether the track be clear.

This duty the law casts upon them as one of the conditions on which they are permitted to use streets, which to some extent they divert from the more ordinary uses, for the private advantage of the carrier, as well as the public convenience. This duty is as firmly fixed on this ground, and upon the ground of the hazardous character of such a business conducted in the street of a town or city, as is the duty of the carrier of passengers by steam, fixed by the hazard of that business to human life, or by the contract for carriage.

If a person be seen on the track of either class of railway, it may be assumed, if the person be an adult, that he will leave the track before the train or car reaches him, and this presumption may be indulged so long as danger does not become imminent, but no longer. From the time that danger is seen to be imminent it becomes the duty of such a railway company to use the highest degree of care to arrest it, and a failure to do so will constitute culpable negligence, which may or may not fix liability, as that question may be affected by the contributory negligence of the injured person. No such presumption, however, can be indulged as to the prudent conduct of an infant of no greater age than was the plaintiff at the time he is alleged to have been injured.

It may be assumed, as matter of law, that it is the duty of a street railway company to know that the track in advance of its car is clear, and that it will be liable for any injury resulting from the want of this knowledge, unless its liability is defeated by the contributory negligence of the injured person, or unless it appears that the person injured went upon its track at a place so near the approaching car that the driver, by the exercise of care, could not avoid the injury after the person was seen or might have been seen. This involves the proposition that such a railway company is bound to use such diligence as will enable it to know whether the track in front of its car is clear, and if to this end the exercise of the highest degree of diligence is necessary, it must be used.

If it be seen that a person is on the track of such a railway company, in advance of its car, it must use such care as will avoid injury to such person, if this can be done, and for a failure to do so it will be liable for the injury resulting, unless such liability is defeated by the contributory negligence of the injured person. The care requisite to avoid injury in such a case embraces every degree. The charge of a court must be considered in relation to the facts of the particular case.

In the case before us the uncontroverted fact is that the child was on appellant's track in advance of the car. Whether it was seen by the driver is not shown, but we concur in the opinion of counsel for appellant, after a careful examination of all the evidence, that the driver did not see it. It was his duty to exercise the highest degree of diligence to ascertain whether persons were on the track in advance of the car; and, in so far as the charge complained of affects this question, it was correct. If the driver saw the child on the track in advance of the car, it was his duty to exercise all the diligence then possible to avoid injury to it; and in this aspect of the case the charge was not erroneous.

It is insisted that "the reasonable and probable conclusion is that the child placed itself suddenly on the track immediately in front of the car, so that he was not discernible by the driver, or, being discernible, was seen too late to enable the driver to avert the catastrophe," and that "this inference is strengthened by the further fact * * * that the mule drawing the car ran off to one side of the track. The child must have placed himself suddenly and immediately in front of the mule, so near that the momentum of the car hurried it over him and concealed him from the view of the driver at the very moment of the animal's abrupt rearing to one side." Whether this was so was for the jury to determine. If, however, such was the fact, it was still proper that the appellant should have been held to that degree of care required by the charge, under which the jury may have come to the conclusion, even though the child suddenly entered upon the track but a short distance in front of the car, that the injury might have been averted had the driver used such care as the charge required, after the child was seen or ought to have been seen. * * * Affirmed.

1. RES IPSA LOQUITUR ¹⁵

GRIFFEN v. MANICE.

(Court of Appeals of New York, 1901. 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.)

CULLEN, J.¹⁶ This action was brought to recover damages for the death of plaintiff's intestate, alleged to have been caused by the defendant's negligence. On December 6, 1898, the defendant was the owner and in possession of an office building in the city of New York in which there was maintained and operated an elevator for carrying

¹⁵ For discussion of principles, see Chapin on Torts, § 111.

¹⁶ A portion of the opinion of Cullen, J., the concurring opinion of Gray, J., and the dissenting opinion of Bartlett, J., are omitted.

passengers to and from the several floors. The deceased was the secretary of the United States Fire Insurance Company, which had leased offices in the basement, and also in the seventh and eighth stories. On the day in question, after having attended a meeting of the directors of the company, held on the eighth story, he took the elevator to return to the basement. The evidence tends to show that the elevator car descended with unusual rapidity, and instead of stopping at the basement, which was the lowest floor, passed beyond until it struck the bumpers at the bottom of the shaft with such force as to rebound about 18 inches, and throw some of the occupants of the elevator down. Almost immediately thereafter the counterbalance weights, which move in a reverse direction to that of the car, and consist of pieces of iron, each from 40 to 60 pounds in weight, fell down the shaft, breaking through the top of the elevator car. One of them struck the plaintiff's intestate on the head, killing him instantly. The plaintiff recovered a verdict at the trial term, and the judgment entered thereon was unanimously affirmed by the appellate division. By leave of the appellate division, an appeal has been taken to this court.

As the decision below was unanimous, the exception to the denial of the defendant's motion to dismiss the complaint at the close of the evidence, and the question of the sufficiency of the evidence to support the verdict, cannot be argued in this court (Const. art. 6, § 9), and our review of the case must be confined to the correctness of the trial court in its ruling on the admission of evidence and its charge to the jury. We shall limit our discussion to the consideration of the three most important objections urged by the appellant against the recovery.

The trial court, over the appellant's exception, charged to the jury: "There is another rule which the plaintiff asks me to call to your attention, and I am going to call to your attention the rule that where an accident happens which, in the ordinary course of business, would not happen if the required degree of care was observed, the presumption is that such care was wanting; and if you find in this case that this accident was one which, in the ordinary course of business, would not have happened if the required degree of care was observed, you have a right to presume that such care was wanting." It is insisted for the appellant that this instruction was erroneous, and that the jury was not authorized in this case to infer the existence of negligence from the accident alone. Primarily, it is argued that the principle which usually passes under the name of "*res ipsa loquitur*" applies only to cases where the relation between the parties is the contractual one of carrier or bailee, or in which the party injured has been injured while on a public highway. While there are some expressions to be found in text-books and decisions which seem to support this claim,

in my judgment it is unfounded, and the application of the principle depends on the circumstances and character of the occurrence, and not on the relation between the parties, except indirectly, so far as that relation defines the measure of duty imposed on the defendant. Writing of *res ipsa loquitur*, it is said in *Shear. & R. Neg.* § 59: "It is not that, in any case, negligence can be assumed from the mere fact of an accident and an injury; but in these cases the surrounding circumstances, which are necessarily brought into view by showing how the accident occurred, contain, without further proof, sufficient evidence of the defendant's duty and of his neglect to perform it. The fact of the casualty and the attendant circumstances may themselves furnish all the proof of negligence that the injured person is able to offer or that it is necessary to offer." I think a single illustration will show the correctness of the view of the learned authors, that it is not the injury, but the manner and circumstances of the injury, that justify the application of the maxim and the inference of negligence. If a passenger in a car is injured by striking the seat in front of him, that, of itself, authorizes no inference of negligence. If it be shown, however, that he was precipitated against the seat by reason of the train coming in collision with another train, or in consequence of the car being derailed, the presumption of negligence arises. The *res*, therefore, includes the attending circumstances, and, so defined, the application of the rule presents principally the question of the sufficiency of circumstantial evidence to establish, or to justify the jury in inferring, the existence of the traversable or principal fact in issue, the defendant's negligence. The maxim is also in part based on the consideration that, where the management and control of the thing which has produced the injury is exclusively vested in the defendant, it is within his power to produce evidence of the actual cause that produced the accident, which the plaintiff is unable to present. Neither of these rules—that a fact may be proved by circumstantial evidence as well as by direct, and that where the defendant has knowledge of a fact but slight evidence is requisite to shift on him the burden of explanation—is confined to any particular class of cases, but they are general rules of evidence applicable wherever issues of fact are to be determined either in civil or criminal actions. In a prosecution for selling liquor without license, it is sufficient for the people to show the sale, leaving the defendant to show his license, if he has one. *Potter v. Deyo*, 19 Wend. 361. Recent possession of stolen goods warrants the inference that the possessor is the thief, both because experience shows that usually the party so in possession is the thief, and because the knowledge of how he came into possession of the goods is generally exclusively his own. In *Breen v. Railroad Co.*, 109 N. Y. 297, 16 N. E. 60, 4 Am. St. Rep. 450, it is said: "There must be reasonable evidence of negligence; but when the thing causing the injury is shown to be under the control of a defendant, and the acci-

dent is such as, in the ordinary course of business, does not happen if reasonable care is used, it does, in the absence of explanation by the defendant, afford sufficient evidence that the accident arose from want of care on its part." I can see no reason why the rule thus declared is not applicable to all cases, or why the probative force of the evidence depends on the relation of the parties. Of course, the relation of the parties may determine the fact to be proved, whether it be the want of the highest care or only want of ordinary care; and, doubtless, circumstantial evidence, like direct evidence, may be insufficient as a matter of law to establish the want of ordinary care, though sufficient to prove absence of the highest degree of diligence. But the question in every case is the same whether the circumstances surrounding the occurrence are such as to justify the jury in inferring the fact in issue. In *Mullen v. St. John*, 57 N. Y. 567, 15 Am. Rep. 530, it was held that the falling of an adjacent building into the street, whereby the plaintiff, traveling on the street, was injured, was *prima facie* evidence of negligence. In *Piehl v. Railway Co.*, 30 App. Div. 166, 51 N. Y. Supp. 755, affirmed in 162 N. Y. 617, 57 N. E. 1122, a flywheel was disrupted, and a portion of it cast across the street into a saloon killing the plaintiff's intestate. It was held that the mere bursting of the flywheel was not sufficient to warrant an inference of negligence. These two cases proceeded on the differing views that this court took as to the nature of the respective accidents, not on the situation of the parties. I think it may be safely said that we would not have held the defendant liable in the latter case had Piehl been killed in the street, or, in the earlier case, the defendant exempt, had the plaintiff been injured while in a neighboring building. To put it tersely, the court thought that, in the absence of tempest or external violence, a building does not ordinarily fall without negligence; while it also thought that the disruption of a flywheel proceeds so often from causes which science has been unable to discover, or against which art cannot guard, that negligence cannot be inferred from the occurrence alone. Authority is not wanting on the point. In *Green v. Banta*, 48 N. Y. Super. Ct. 156, a workman was injured by the breaking down of a scaffold. In a suit against his master the court charged: "The fact that the scaffold gave way is some evidence—it is what might be called *prima facie* evidence—of negligence on the part of the person or persons who were bound to provide a safe and proper scaffold." This charge was held correct by the general term of the superior court of the city of New York, and the decision affirmed by this court, 97 N. Y. 627. In *Mulcairns v. City of Janesville*, 67 Wis. 24, 29 N. W. 565, the fall of a wall was held presumptive evidence of negligence in a suit by a servant against his master. In *Smith v. Gaslight Co.*, 129 Mass. 318, it was held that the escape of gas from the pipes of a gas company was *prima facie* evidence of negligence. In that case there seems to have been no contractual relations whatever between the parties. In

Peck v. Railroad Co., 165 N. Y. 347, 59 N. E. 206, which was an action for injury to plaintiff's property by fire, it was said: "But, while it was necessary for the plaintiff to affirmatively establish negligence on the part of the defendant, either in the condition or in the operation of its engine, for which the mere occurrence of the fire was not sufficient, it was not necessary that he should prove either the specific defect in the engine or the particular act of misconduct in its management or operation constituting the negligence causing the injury complained of. It was sufficient if he proved facts and circumstances from which the jury might fairly infer that the engine was either defective in its condition or negligently operated." This is the principle which underlies the maxim of *res ipsa loquitur*. When the facts and circumstances from which the jury is asked to infer negligence are those immediately attendant on the occurrence, we speak of it as a case of *res ipsa loquitur*; when not immediately connected with the occurrence, then it is an ordinary case of circumstantial evidence. In *Benedick v. Potts*, 88 Md. 52, 40 Atl. 1067, 41 L. R. A. 478, it is said: "In no instance can the bare fact that an injury has happened, of itself and divorced from all the surrounding circumstances, justify the inference that the injury was caused by negligence. It is true that direct proof of negligence is not necessary. Like any other fact, negligence may be established by the proof of circumstances from which its existence may be inferred. * * * This phrase [*res ipsa loquitur*], which, literally translated, means that 'the thing speaks for itself,' is merely a short way of saying that the circumstances attendant upon an accident are themselves of such a character as to justify a jury in inferring negligence as the cause of that accident."

Returning now to the case before us, it appears that the deceased was present by the implied invitation of the defendant, extended to him and all others who might have lawful business on the premises, to use the elevator as a means of proceeding from one story to another. The defendant, therefore, owed the plaintiff the duty of using at least reasonable care in seeing that the premises were safe. The death of the plaintiff's intestate was caused by the fall of the counterbalance weights. These weights were held in a frame, to which was attached a rope or cable passing around a drum. The weights fell down from the frame, and the rope was thrown off the drum. That no such accident could ordinarily have occurred, had the elevator machinery been in proper condition and properly operated, seems to me very plain. The court was, therefore, justified in permitting the jury to infer negligence from the accident; construing, as I do, the term "accident" to include not only the injury, but the attendant circumstances.

The next exception of the appellant relates to the degree of care which the learned trial court instructed the jury the defendant was bound to exercise. The court charged: "As to the machinery and

appliances by which an elevator is moved and controlled in its ascent and descent, an owner is bound to use the utmost care as to any defect which would be liable to occasion great danger or loss of life, and he is in that respect subject to the same rule that applies to a railroad company in regard to its roadbed, engine, and other similar machinery. Now, the rule that is applicable to a railroad company, as to its roadbed, engine, and machinery, is that they are bound to exercise the utmost care and diligence, and are liable for the slightest neglect against which human prudence and foresight might have guarded." This instruction is sustained by the decision of the Supreme Court of California in *Treadwell v. Whittier*, 80 Cal. 574, 22 Pac. 266, 5 L. R. A. 498, 13 Am. St. Rep. 175. In *McGrell v. Building Co.*, 153 N. Y. 265, 47 N. E. 305, the question was discussed by counsel, but not passed upon by the court in its disposition of the case. In determining the correctness of the rule of liability laid down by the trial court, the relation of the parties, which I think not controlling on the application of the maxim *res ipsa loquitur*, is of vital importance. Doubtless no distinction can be drawn between vertical transportation and horizontal transportation, or transportation along the surface of the earth. If the relationship between the parties and the character of the carrier are the same in both cases, there is no reason why the same measure of diligence should not be exacted in one case as in the other. But the defendant was not a common carrier, and received no compensation, at least directly, for carrying persons from one floor to another. The right of any person to be carried in the elevator was based on the implied invitation to enter, which the defendant, as owner of the property, is deemed to have extended to all who might have business on the premises. To such persons the law imposed upon the occupant or owner the duty of seeing that the premises were in a reasonably safe condition for access and entering. 2 Shear. & R. Neg. § 704; *Beck v. Carter*, 68 N. Y. 283, 23 Am. Rep. 175. But "the measure of his duty was reasonable prudence and care." *Larkin v. O'Neill*, 119 N. Y. 221, 23 N. E. 563; *Hart v. Grennell*, 122 N. Y. 371, 25 N. E. 354. If the charge of the trial court is to be sustained, we must hold that the maintenance and operation of an elevator form an exception to the general standard of care imposed by the law upon the owners and occupants of real property. We see no reason for making this exception. The operation of an elevator, no doubt, involves danger, and, if accident occurs, it may result in most serious consequences. It is not, however, the only dangerous appliance used in modern buildings. The boiler which furnishes steam heat, the conductors through which electric light is furnished, may at times be the cause of serious accidents. An open hatchway is equally dangerous. Yet it has never been attempted to impose upon the owner of a building any greater responsibility as to these matters than that of exercising reasonable care. It is very probable

that, in the advance of mechanical arts, many new appliances will be introduced into buildings which will involve danger. It seems to me impracticable to distinguish as to the measure of the owner's duty between these appliances, and that such an attempt would involve great confusion in the law. I do not wish to be misunderstood. In the exercise of the same degree of care, different degrees of precaution may be necessary. The same man, with equal prudence, will leave an article of furniture unguarded in his house, and carefully secrete or lock up jewelry or money. So, the more dangerous an appliance may be, the more attention may be requisite. If the fair purport of the charge of the court was only that the care should be commensurate with the danger, it might not be objectionable. The charge, however, goes far beyond this. The utmost human care and foresight would require the owner of a building to use the most modern and improved form of elevator, the latest successful mechanical device, and the most skillful operators. Such is the rule in the operation of railroads, and this degree of diligence may well be required where, for a consideration, there is a contract to carry safely. But common knowledge informs us that such a rule would be unreasonable, applied to elevators in ordinary buildings. There are elevators not only in great office buildings and hotels, but also in small buildings, and even in many private houses. Where there is little traffic the duty of operating the elevator is at times imposed on an employé or servant with other work to perform. To require in all these cases (and I do not see how it is possible to distinguish between them on the law) the same measure of duty that is imposed on a railroad company or common carrier would be going too far. I think sufficient security is afforded the public when owners or occupants of a building are required to use reasonable care in the character of the appliance they provide, and in its maintenance and operation. The stairways are always open to those who deem this degree of diligence inadequate for their protection. The charge of the learned trial court was therefore erroneous. * * *

HUGHES v. ATLANTIC CITY & S. R. CO.

(Court of Errors and Appeals of New Jersey, 1914. 85 N. J. Law, 212,
89 Atl. 769, L. R. A. 1916A, 927.)

SWAYZE, J. The plaintiff, a passenger in a car of the defendant, was injured by fragments of glass from the explosion of an electric light bulb in the ceiling of the car. There was no proof of the cause of the explosion; the plaintiff went no further than to testify that "probably it was a weak bulb, and the voltage might have run up on it, and of course it had a tendency to burst the globe."

The learned trial judge, in view of the high degree of care required of a carrier of passengers, told the jury that "when an accident of

this kind happens to some of the means of transportation, the law shifts the burden of proof from the plaintiff as to the explanation or showing the actual cause to the defendant, and imposes upon it the burden of making an explanation exculpating itself from negligence." The question he put to the jury was: "Has the defendant done that?" To leave no doubt of his meaning he added: "The explanation is one that you must pass upon, whether or not the burden which the law casts upon the defendant in a case of injuries, an accident of this kind, has been met. If it has, then of course the negligence that the law would infer from the proof of the facts of the accident and the nature of it does not exist, and the company would not be answerable at all."

The effect of this charge was to relieve the plaintiff from the duty to satisfy the jury, by the preponderance of the evidence, that the defendant had been negligent, and to deprive the defendant of his right, which we have said is a substantial one, to have the plaintiff bear the burden of the affirmative. *Bien v. Unger*, 64 N. J. Law, 596, 46 Atl. 593; *McGilvery v. Electric Light & Power Co.*, 63 N. J. Law, 591, 44 Atl. 637. The learned trial judge distinctly said that this burden shifted to the defendant, and he did not even submit to the jury the question whether the plaintiff had established negligence; he treated that as a matter of legal inference, and only left to the jury to say whether the defendant had exculpated itself. He thus put upon the defendant, in a case where there was no direct evidence of negligence, a burden from which it would have been free in a case where there was direct evidence. Instead of the question that has been so much discussed in the cases, whether negligence may be inferred from the mere fact of injury, we now have the proposition that the inference of negligence is so strong that the jury need not consider it at all, but need only consider whether the defendant has exculpated himself.

This is an unwarranted extension of the application of the maxim *res ipsa loquitur*. The importance of the rule which finds expression in that maxim is found in the province of the trial judge, and not in the province of the jury. He is called on in the first instance to say whether there is any evidence of negligence to go to the jury; in the absence of direct evidence he may, in cases where the maxim applies, hold that the circumstances are such as will, unexplained, permit the jury to draw the inference of negligence; but that inference is still one for the jury and not for the court. They may not believe the witnesses; the circumstances may be such that the jury will attribute the injury to some cause with which the defendant has nothing to do; they may find the inference of negligence too weak to persuade their minds; they may think a reasonably prudent man would have been unable to take precautions to avoid the injury; and, in any event, they may render a verdict for the defendant. This is within their province even when there is no explanation by the defendant. When there is such explanation, it is for the jury to decide, just as in the ordinary

case of whatever kind, what the actual facts are, and what inference should be drawn therefrom. The most that is required of the defendant is explanation, not exculpation; and that explanation may leave the mind in equipoise, in which case the defendant would be entitled to a verdict because the plaintiff has failed to prove his case by the weight of the evidence.

The question discussed in the cases that involve the application of the maxim *res ipsa loquitur* has always been whether mere proof of the injury justified a jury in drawing an inference of negligence so that a nonsuit would be improper, or, in other words, whether it sufficed to prevent a nonsuit. Negligence in such a case may be a permissible inference, but is not a necessary one, as the judge's charge treated it. In the first case in which the maxim was discussed in this state, Chief Justice Beasley, who dissented because he thought the plaintiff had made out a case, said that the facts as proved would have legally warranted a verdict against the defendants, but he did not suggest that, in the absence of explanation, such a verdict would have been required, and the court would have been justified in directing a verdict for the plaintiff. The reason of course is that negligence in such a case is only a matter of inference, and under our system is for the jury.

The rule has been stated with great accuracy by Mr. Justice Dixon, speaking for this court, in an action by a passenger against a carrier. He says: "The rule supported by authority is that when a passenger shows that he was injured through some defect in the appliances of the carrier, or through some act or omission of the carrier's servant, which might have been prevented by due care, then the jury have the right to infer negligence, unless the carrier proves that due care was exercised." *Whalen v. Consolidated Traction Co.*, 61 N. J. Law, 606, 40 Atl. 645, 41 L. R. A. 836, 68 Am. St. Rep. 723. In *Mumma v. Easton & Amboy R. R. Co.*, 73 N. J. Law, 653, 65 Atl. 208, we again said that the meaning of the maxim *res ipsa loquitur* was that "the occurrence itself, in the absence of explanation by the defendant, affords *prima facie* evidence that there was want of due care." It is evidence; whether it amounts to proof is for the jury to say, even in the absence of explanation by the defendant. A very good statement of the law in a case much like the present is to be found in *White v. Boston & Albany R. R.*, 144 Mass. 404, 11 N. E. 552. The court said: "If the shade was defective and unsafe, the question whether it was in that condition through the negligence of the defendant would be for the jury; and the fact that it broke and fell from the use for which it was intended would be evidence that it was defective and unsafe, and, if not explained or controlled, would be sufficient evidence to authorize the jury to find that the defendant was negligent in regard to it." This is a full recognition of the ordinary rule that inferences from the facts of the case are for the jury. The result we reach is

also sustained by a recent opinion of Mr. Justice Pitney in the United States Supreme Court, *Sweeney v. Erving*, 228 U. S. 233, 33 Sup. Ct. 416, 57 L. Ed. 815, Ann. Cas. 1914D, 905.

The inference of negligence from the mere happening of the accident may be a legal inference in the sense that it is permitted by the law, but it is not a legal inference in the sense that it is required. It is true that in some cases language may be found to the effect that, under certain circumstances, the burden of proof shifts, while other cases declare quite as explicitly that the burden of proof never shifts. The seeming conflict arises from the ambiguous meaning of the words "burden of proof" as applied to jury trials. This ambiguity is dealt with by Thayer in two of the most enlightening chapters of a most enlightening book, well said by Wigmore to be epoch-making, *Preliminary Treatise on Evidence*, 353, and by Wigmore, with a somewhat different form of statement and ample citation of authorities, *Wigmore on Evidence*, § 2483 and the following. In one sense "burden of proof" means the duty of the actor, i. e., the party having the affirmation of the issue to establish the proposition at the end of the case. In this sense the burden never shifts. The distinction is pointed out in a case cited by Thayer, of an action to recover damages for injury caused by the explosion of a boiler of a steamboat in which the plaintiff was a passenger. *Caldwell v. New Jersey Co.*, 47 N. Y. 282, 290. In a second sense the expression means the duty of going forward in argument, or in producing evidence, and in this sense the burden may shift according as one side or the other has satisfied the judge that the evidence suffices to make a *prima facie* case in his favor. The practical distinction is well stated by Wigmore, and it is, as he says, important: "The risk of nonpersuasion operates when the case has come into the hands of the jury, while the duty of producing evidence implies a liability to a ruling by the judge, disposing of the issue, without leaving the question open to the jury's deliberations." Wigmore, § 2487. In applying the law to a case like the present, we think it clear that the plaintiff was bound to satisfy the jury, by the preponderance of evidence, that the defendant was guilty of negligence that caused the accident; if he introduced no evidence, or no evidence from which an inference of negligence could be drawn, it would be the duty of the judge to direct a verdict for the defendant; if he introduced evidence which permitted or required an inference of negligence, it would be for the jury to say whether they believed the witnesses, and, where an inference of negligence was permissible but not required, whether they drew that inference. The mere occurrence of the present injury did not require a finding of negligence, since the bulb may have burst from some cause beyond the defendant's control. When the judge said that the burden shifted, the context shows that he meant the duty of persuasion upon the whole case. In no other

sense was the jury concerned with burden of proof. He thereby imposed upon the defendant a duty that the law imposes on the plaintiff.

For the failure to submit to the jury the question of defendant's negligence upon the whole case, the judgment must be reversed, to the end that a venire de novo may issue.

V. Damage¹⁷

BLATE v. THIRD AVE. R. CO.

(Supreme Court of New York, Appellate Division, First Department, 1899.
44 App. Div. 163, 60 N. Y. Supp. 732.)

RUMSEY, J.¹⁸ * * * Great stress is laid to the charge of the learned trial justice on the question of damages. The facts were that, as a result of the collision, the plaintiff suffered a rupture in the groin, which caused him, as the jury have found, considerable inconvenience, and no little pain, and was, at the time of the trial, growing worse. It is quite evident that the damages which were given by the jury were based in a very considerable amount upon this rupture. The evidence of surgeons was given, not only as to the existence of the rupture as the result of this accident, but also as to the probability of its cure if the plaintiff would submit to a surgical operation. The defendant's expert testified that such an operation would almost certainly result in a cure; but the physicians sworn on behalf of the plaintiff, while admitting that such an operation would probably result in a cure, said that it was by no means certain. It was stated by the plaintiff's witnesses that such an operation would be dangerous to life, but the expert surgeon sworn on behalf of the defendant said it was not now really dangerous to life, although six or eight years ago it was considered a dangerous operation. In view of that condition of the evidence, the defendant insisted that it was the duty of the plaintiff to submit to an operation, which would be practically certain to result in a cure; and because he did not do so he was not entitled to recover damages for a permanent or continuing rupture. On that branch of the case the learned trial justice charged the jury: "Something has been said to you regarding the possibility of the plaintiff having had a radical cure effected by submitting himself to a surgical operation. I charge you, upon that subject, that a person who has been injured by an accident of this kind is bound to use the usual and reasonable remedies which are appropriate to alleviate or cure such an accident as he has suffered. He is not permitted to increase and enhance the damages which he has suffered by negligently,

¹⁷ For discussion of principles, see Chapin on Torts, § 112.

¹⁸ A portion of the opinion is omitted.

or carelessly, or willfully permitting his condition to get worse than it would be if properly treated. At the same time no man is bound, for the purpose of reducing the amount of damages which he may be entitled to recover from a person who has done him wrong,—no man is bound to submit himself to a surgical operation which may, even in the remotest degree, be an operation attended with danger. That is a matter which he must determine for himself; and if he, through apprehension, or for any other cause, has determined that he will not submit himself to such an operation, the defendant is not entitled to take advantage of his failure to do so. At the same time you are to take into consideration, determining the amount of injury which this man has suffered, and the permanency of his injury, all the testimony that you have heard from the experts upon the subject of the possibility of curing a disease of this kind by a surgical operation, and the slight inconvenience which is said to result from such operation in most cases.”

To this charge as an entirety an exception was taken. Counsel for the defendant insists that the charge was erroneous, but he made no request to the court to modify it, or to charge more fully upon any proposition contained in it; so that, if the propositions charged are correct, defendant cannot complain that the court should have charged more fully in regard to them. The rule of damages in such cases is not at all doubtful. It is that the party who claims to have suffered damage by the tort of another party is bound to use reasonable and proper efforts to make the damage as small as practicable, and that he is not entitled to recover for any damage which, by the use of such efforts, might have been avoided, because they are not to be regarded as the natural result of the tort. *Am. & Eng. Enc. Law* (2d Ed.) 605. The question in every case is whether the plaintiff has used such means as were at hand to reduce his damages as a reasonably prudent man would have used. It cannot be said as a matter of law that he is bound to use any particular means, or to do any particular thing (unless that thing is one which would necessarily result in reducing the damage, and which a reasonable and prudent man would use). If, in any given case, it appears that the particular means which may be used to effect a cure would or might cause greater injury, or produce serious results, quite clearly the injured person would not be called upon as a matter of law to take the chances of suffering more serious injury, or death, for the purpose of reducing the damage. While the person who inflicts the damage has the right to say that sure and safe means to diminish the evil results of the accident, if any such exist, must be used, yet that is the extent of his right. Whether further means should be resorted to is for the plaintiff to determine. In making that determination the plaintiff has the right to consider the nature of the means used to effect a cure, and a possible or probable effect upon himself. He has to determine for himself whether he is to resort to those means

in view of those considerations. In any given case it may be that the treatment which is given to the plaintiff is not the best that could be devised, but the plaintiff is not the less entitled to his damages on that account if, in taking that treatment, he has consulted such a physician as a reasonably prudent man would consult. The jury, in getting at the damages, are to say not only what they are, but whether the means used by the plaintiff to reduce the damages were such as an ordinarily prudent man would use. They cannot say that he should or should not have taken the advice of any particular physician, nor that he should have obtained any particular kind of treatment. As to that he must himself be the judge. But when he has determined what treatment to take, it will yet be for the jury to say if, in making that determination, he used the means that a reasonably prudent man would take to cure himself of his injury. If he did, he is entitled to recover for his damages as they are presented to the jury. If he did not, and the jury can say that some other treatment would have brought about a cure, and that treatment was one that a reasonably prudent man would have submitted to, then they must say that he has not used the care which a reasonably prudent man would use to reduce the damages, and must take that into consideration in reaching their verdict. That is what was substantially said to them by the learned trial justice. The law lays down no hard and fast rule as to the duty of the plaintiff under such circumstances. Whether an operation for his ailment, which might endanger his life in any degree, must be submitted to, is a question which the law cannot answer; nor does it lie in the mouth of a jury to say that the plaintiff should or should not do any particular thing. They are concerned simply with the affairs presented to them at the trial, and whether the damages then appearing to exist are the natural and probable result of the injuries, diminished by the efforts for a cure which a reasonably prudent man would have made. This is substantially what was said by the learned trial justice, and with this statement of the law we are content. If the jury concluded—as they might—that the serious injuries which the plaintiff received were the natural and probable result of this injury tested by these rules, they were quite justified in giving him a verdict for the amount which they did, and the damages were not excessive.

The judgment and order must therefore be affirmed, with costs. All concur.

VI. Contributory Negligence

1. COMMON-LAW RULE¹⁹

TEMPLETON'S ADM'R v. LYNCHBURG TRACTION & LIGHT CO.

(Supreme Court of Appeals of Virginia, 1910. 110 Va. 853, 67 S. E. 351.)

HARRISON, J. This action was brought by the administrator of Charles R. Templeton to recover of the Lynchburg Traction & Light Company damages for its alleged negligence in causing the death of the plaintiff's intestate. There was a demurrer to the plaintiff's evidence, which was sustained, and judgment given for the defendant. This judgment we are asked to review and reverse.

Upon consideration of the evidence it is difficult to see wherein the defendant company has been guilty of any negligence that was proximately the cause of the injury which resulted in the death of the plaintiff's intestate. If, however, the negligence of the defendant company was established, it would be under no liability to the plaintiff, because his intestate is shown to have been guilty of such contributory negligence as to preclude all right of recovery by him.

The law will not weigh or apportion the concurring negligence of a plaintiff and defendant. There can be no recovery by a plaintiff who has been guilty of contributory negligence. *Clinchfield Coal Co. v. Wheeler*, 108 Va. 448, 62 S. E. 269.

At the time of his death the plaintiff's intestate was working for the Bell Telephone Company; his business being to locate and remedy contacts between the wires of his employer and those of other companies, to disengage, disentangle, and separate such wires, etc. He had been for some time engaged in this character of work all over the city of Lynchburg, and it abundantly appears that he was thoroughly acquainted with the great danger to which he was constantly exposed, and fully advised of the necessity for constant care and vigilance on his part to avoid coming in contact with the wires about which he worked. On the day of the accident, the gang of linemen of which deceased was a member assembled for the purpose of taking down an old cable of the telephone company. This cable was in the vicinity of other wires, the highest of which was the heavily charged wire of the defendant traction company. In addition to his general knowledge of the danger, the deceased was specially warned of the hazardous character of the work he was doing when he lost his life. As the deceased and others were about to ascend the poles, the foreman told them of

¹⁹ For discussion of principles, see Chapin on Torts, § 113.

the unusual danger, and that they must look out for the 2,300-volt wires under them and the 13,000-volt wires above them, and not to touch either; that they would be killed if they did. At the time of the accident the deceased was bending over tying a "traveling block" to the cross-arm of the telephone company's pole, and while thus engaged a fellow workman, who was on another pole near him, noticing that deceased was dangerously near the 13,000-volt wire, called out to him, saying: "Look out there! If you straighten up and touch them wires you will be a goner." The witness says that when this warning was given the deceased looked at him and smiled, and turned his head around and looked up at the wires to which he had referred; that he thought surely he was not going to straighten up then. In about a minute after this last warning was given the deceased raised up and came in contact with the 13,000-volt wire of the defendant company, and immediately fell lifeless to the ground. The evidence shows that the wires were far enough apart for the work in hand to have been done with safety by the exercise of reasonable care, and that deceased lost his life solely as a result of his own imprudence and lack of caution.

There can be no recovery in such a case, and the judgment must be affirmed.

Affirmed.

2. RULE IN ADMIRALTY ²⁰

THE MAX MORRIS.

(Supreme Court of the United States, 1890. 137 U. S. 1, 11 Sup. Ct. 29, 34 L. Ed. 586.)

This was a suit in admiralty, brought in the District Court of the United States for the Southern District of New York, by Patrick Curry against the steamer Max Morris.

The libel alleged that on the 27th of October, 1884, the libellant was lawfully on board of that vessel, being employed to load coal upon her by the stevedore who had the contract for loading the coal; that, on that day, the libellant, while on the vessel, fell from her bridge to the deck, through the negligence of those in charge of her, in having removed from the bridge the ladder usually leading therefrom to the deck, and in leaving open, and failing to guard, the aperture thus left in the rail on the bridge; that the libellant was not guilty of negligence; and that he was injured by the fall and incapacitated from labor. He claimed \$3,000 damages.

²⁰ For discussion of principles, see Chapin on Torts, § 113.

The answer alleged negligence on the part of the libelant and an absence of negligence on the part of the claimant.

The District Court, held by Judge Brown, entered a decree in favor of the libelant for \$150 damages, and \$32.33 as one-half of the libelant's costs, less \$47.06 as one-half of the claimant's costs making the total award to the libelant \$135.27. The opinion of the District Judge is reported in 24 Fed. 860. It appeared from that that the judge charged to the libelant's own fault all his pain and suffering and all mere consequential damages, and charged the vessel with his wages, at \$2 per day, for seventy-five working days, making \$150.

The claimant appealed to the Circuit Court, on the ground that the libel should have been dismissed. It was stipulated between the parties that the facts as stated in the opinion of the District Judge should be taken as the facts proved in the case, and that the appeals should be heard on those facts. Judge Wallace, who heard the case on appeal in the Circuit Court, delivered an opinion, in August, 1886, which is reported in 28 Fed. 881, affirming the decree of the District Court. No decree was made on that decision, but the case came up again in the Circuit Court on the 14th of March, 1887, the court being held by Mr. Justice Blatchford and Judge Wallace, when a certificate was signed by them stating as follows: "The libelant was a longshoreman, a resident of the city and county of New York, and was, at the time when the said accident occurred, employed as longshoreman, by the hour, by the stevedore having the contract to load coal on board the steamship Max Morris. The injuries to the libelant were occasioned by his falling through an unguarded opening in the rail on the after-end of the lower bridge. The Max Morris was a British steamship hailing from Liverpool, England. The defendant contends, as a matter of defense to said libel, that the injuries complained of by libelant were caused by his own negligence. The libelant contends that the injuries were occasioned entirely through the fault of the vessel and her officers. The court finds, as a matter of fact, that the injuries to the libelant were occasioned partly through his own negligence, and partly through the negligence of the officers of the vessel. It now occurs, as a question of law, whether the libelant, under the above facts, is entitled to a decree for divided damages. On this question the opinions of the judges are in conflict." On motion of the claimant, the question in difference was certified to this court, and a decree was entered by the Circuit Court affirming the decree of the District Court and awarding to the libelant a recovery of \$135.27, with interest from the date of the decree of the District Court, and \$26.30 as the libelant's costs in the Circuit Court making a total of \$172. From that decree the claimant has appealed to this court. Rev. Stat. §§ 652, 693; *Dow v. Johnson*, 100 U. S. 158, 25 L. Ed. 632.

Mr. Justice BLATCHFORD, after stating the case as above reported, delivered the opinion of the court.²¹

The question discussed in the opinions of Judge Brown and Judge Wallace, and presented to us for decision, is whether the libelant was debarred from the recovery of any sum of money by reason of the fact that his own negligence contributed to the accident, although there was negligence also in the officers of the vessel. The question presented by the certificate is really that question, although stated in the certificate to be whether the libelant, under the facts presented, was entitled to a decree "for divided damages." It appears from the opinion of the District Judge that he imposed upon the claimant "some part of the damage" which his concurrent negligence occasioned, while it does not appear from the record that the award of the \$150 was the result of an equal division of the damages suffered by the libelant, or a giving to him of exactly one-half, or of more or less than one-half, of such damages.

The particular question before us has never been authoritatively passed upon by this court, and is, as stated by the District Judge in his opinion, whether, in a court of admiralty, in a case like the present, where personal injuries to the libelant arose from his negligence concurring with that of the vessel, any damages can be awarded, or whether the libel must be dismissed, according to the rule in common-law cases.

The doctrine of an equal division of damages in admiralty in the case of a collision between two vessels, where both are guilty of fault contributing to the collision, had long been the rule in England, but was first established by this court in the case of *The Schooner Catharine v. Dickinson*, 17 How. 170, 15 L. Ed. 233, and has been applied by it to cases where, both vessels being in fault, only one of them was injured as well as to cases where both were injured, the injured vessel, in the first case, recovering only one-half of its damages, and, in the second case, the damages suffered by the two vessels being added together and equally divided, and the vessel whose damages exceeded such one-half recovering the excess against the other vessel. In the case of *The Schooner Catharine v. Dickinson*, *supra*, both vessels being held in fault for the collision, it was said by the court, speaking by Mr. Justice Nelson (17 How. 177, 15 L. Ed. 233), that the well-settled rule in the English admiralty was "to divide the loss," and that "under the circumstances usually attending these disasters" the court thought "the rule dividing the loss the most just and equitable, and as best tending to induce care and vigilance on both sides, in the navigation."

In *Atlee v. Packet Co.*, 21 Wall. 389, 395 (22 L. Ed. 619), Miller, J., said: "But the plaintiff has elected to bring his suit in an admiralty

²¹ Portions of the opinion are omitted.

Court, which has jurisdiction of the case, notwithstanding the concurrent right to sue at law. In this court the course of proceeding is in many respects different and the rules of decision are different. The mode of pleading is different, the proceeding more summary and informal, and neither party has a right to trial by jury. An important difference as regards this case is the rule for estimating the damages. In the common-law court the defendant must pay all the damages or none. If there has been on the part of the plaintiffs such carelessness or want of skill as the common law would esteem to be contributory negligence, they can recover nothing. By the rule of the Admiralty Court, where there has been such contributory negligence, or, in other words, when both have been in fault, the entire damages resulting from the collision must be equally divided between the parties. This rule of the admiralty commends itself quite as favorably in its influence in securing practical justice as the other, and the plaintiff who has the selection of the forum in which he will litigate cannot complain of the rule of that forum." This court, therefore, treated the case as if it had been one of a collision between two vessels. * * *

Some of the cases referred to show that this court has extended the rule of the division of damages to claims other than those for damages to the vessels which were in fault in a collision. * * *

The rule of the equal apportionment of the loss where both parties were in fault would seem to have been founded upon the difficulty of determining in such cases the degree of negligence in the one and the other. It is said by Cleirac (*Us et Coutumes de la Mer*, p. 68) that such rule of division is a rustic sort of determination, and such as arbiters and amicable compromisers of disputes commonly follow, where they cannot discover the motives of the parties, or when they see faults on both sides.

As to the particular question now presented for decision, there has been a conflict of opinion in the lower courts of the United States. * * *

All these were cases in admiralty, and were not cases of collision between two vessels. They show an amelioration of the common-law rule, and an extension of the admiralty rule, in a direction which we think is manifestly just and proper. Contributory negligence in a case like the present should not wholly bar recovery. There would have been no injury to the libellant, but for the fault of the vessel; and while, on the one hand, the court ought not to give him full compensation for his injury, where he himself was partly in default, it ought not, on the other hand, to be restrained from saying that the fact of his negligence should not deprive him of all recovery of damages. As stated by the District Judge in his opinion in the present case, the more equal distribution of justice, the dictates of humanity, the

safety of life and limb, and the public good, will be best promoted by holding vessels liable to bear some part of the actual pecuniary loss sustained by the libellant, in a case like the present, where their fault is clear, provided the libellant's fault, though evident, is neither willful, nor gross, nor inexcusable, and where the other circumstances present a strong case for his relief. We think this rule is applicable to all like cases of marine tort, founded upon negligence, and prosecuted in admiralty, as in harmony with the rule for the division of damages in cases of collision. The mere fact of the negligence of the libellant as partly occasioning the injuries to him, when they also occurred partly through the negligence of the officers of the vessel, does not debar him entirely from a recovery.

The necessary conclusion is that the question whether the libellant, upon the facts found, is entitled to a decree for divided damages, must be answered in the affirmative, in accordance with the judgment below. This being the only question certified, and the amount in dispute being insufficient to give this court jurisdiction of the whole case, our jurisdiction is limited to reviewing this question. *Union Bank v. Kansas City Bank*, 136 U. S. 223, 10 Sup. Ct. 1013, 34 L. Ed. 341. Whether in a case like this the decree should be for exactly one-half of the damages sustained, or might, in the discretion of the court, be for a greater or less proportion of such damages, is a question not presented for our determination upon this record, and we express no opinion upon it.

Decree affirmed.

3. "THE LAST CLEAR CHANCE" ²²

INDIANAPOLIS TRACTION & TERMINAL CO. v. CROLY.

(Appellate Court of Indiana, 1911. 54 Ind. App. 566, 96 N. E. 973.)

LAIRY, J.²³ The appellee in this case, a child between 11 and 12 years of age, was injured by being run over by appellant's street car. The complaint charges appellant was negligent in running its car at a high and dangerous rate of speed through a populous part of the city, and that no gong was sounded or other warning given of the approach of the car to the place where plaintiff was injured. It is further alleged that the motorman in charge of said car did not have the same under proper control. The issue was formed by an answer in general denial. The case was submitted to a jury for trial, and a verdict was returned in favor of the plaintiff. * * *

²² For discussion of principles, see Chapin on Torts, § 113.

²³ Portions of the opinion are omitted.

We have held in this case that the undisputed evidence shows that the plaintiff failed to use due care for her own safety in approaching and entering upon the tracks of the defendant in such a way as to expose herself to danger from a moving car; but this does not amount to a finding that she was guilty of contributory negligence. Before it can be held as a matter of law that she was guilty of contributory negligence, it must further appear that the second essential element of contributory negligence was present, namely, the causal connection between the want of due care on the part of the plaintiff and her injury. Where the evidence shows without dispute, as it does in this case, that a collision actually occurred by reason of the plaintiff being in a place of threatened danger, to which her own negligence has exposed her, the court will infer that the injury occasioned by the collision was the proximate result of such want of due care on her part, unless there is some evidence in the record to rebut the presumption as to such causal connection. If, however, there is evidence in the record which tends to rebut the presumption and from which the jury may have found that such want of due care on her part was not the proximate cause, but only the remote cause, of the injury, then the verdict can be upheld notwithstanding the failure of the plaintiff to use due care. Under such a state of the evidence, contributory negligence cannot be declared by this court as a matter of law, for the reason that there is a conflict in the evidence as to the second essential element of contributory negligence.

When the evidence is of such a character that it tends to show that the want of due care on the part of the plaintiff was not the proximate cause of the injury, but only the remote cause, or only gave rise to a condition with reference to which the defendant was required to act, it gives room for the application of the doctrine of last clear chance. The court in this case instructed upon this doctrine and submitted the case to the jury upon the theory that, if certain facts enumerated in the instructions appeared from the evidence, they would be justified in finding for the plaintiff, even though she did not use due care. If there is some evidence in the record tending to establish a state of facts to which the doctrine of last clear chance can be properly applied, such evidence will sustain the verdict. It is contended by the appellant that there is no evidence in the record tending to prove any state of facts to which this doctrine can be correctly applied, and this leads us to a further consideration of the proper application of this doctrine.

* * *

In entering upon the discussion of the correct application of the rule under consideration, it is proper to remark that its application does not so operate as to constitute it an exception to the long-established rule that contributory negligence on the part of the person injured bars a recovery unless the injury is wantonly or willfully inflicted. This rule, without any recognized exceptions, is still the law of this state. It may also be stated that the law of comparative negligence

formerly recognized in Illinois has never been recognized or applied by the courts of this state.

If a plaintiff is negligent to any degree, and such negligence proximately contributes to his injury, he cannot recover on account of the negligence of the defendant, and it matters not that his negligence may have been slight as compared with more gross and reprehensible negligence on the part of the defendant. *Terre Haute, etc., R. Co. v. Graham*, 95 Ind. 286, 48 Am. Rep. 719; *Pennsylvania Co. v. Roney*, 89 Ind. 453, 46 Am. Rep. 173; *Ivens v. Cincinnati, etc., R. Co.*, 103 Ind. 27, 2 N. E. 134.

The doctrine of last clear chance is not an exception to either of the well-settled rules just stated. Its proper application does not permit an injured person to recover in spite of negligence on his part contributing to the injury, but it does permit a recovery notwithstanding a want of due care on the part of the plaintiff, in cases where the facts are such that it may be said that the plaintiff's want of due care was not the proximate cause of the injury. Evidence to which this rule of law is applicable does not tend to prove that the injured party used due care, but it does tend to prove that such want of due care on the part of the plaintiff was not the proximate cause of the injury, and that the injury was caused solely by the failure of the defendant to take advantage of the last clear chance of avoiding the injury. *Smith v. Norfolk, etc., R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; *Nashua Iron, etc., v. Worcester, etc., R. Co.*, 62 N. H. 159; *Tanner v. Louisville, etc., R. Co.*, 60 Ala. 621; *Button v. Hudson River Co.*, 18 N. Y. 248. * * *

From the very language in which the rule is generally expressed, it is apparent that, in order to hold a defendant liable by the application of the rule, it must appear from the evidence that such defendant's opportunity of preventing the injury was later in point of time than that of the plaintiff, and that such defendant failed to take advantage of the last clear chance. The rule has been most frequently applied to a class of cases in which it appears that the person or property of the plaintiff has been injured by a collision with a locomotive, car, street car, automobile, or other agency under control of the defendant or his agents; but other cases may arise in which the rule may find a proper application. The rule cannot be applied to every case in which it appears that an injury has been inflicted on the plaintiff or his property by a collision with an agency under the control of the defendant, but only in such of those cases as are brought within the operation of the rule by the facts disclosed by the evidence. Where the evidence in the case tends to show that the situation of the parties just prior to the injury was such that the defendant, by the exercise of due care, could have prevented it, and that the plaintiff could not, then the rule becomes applicable. If, however, the undisputed evidence shows that the opportunity of the plaintiff to avoid the injury was as late or later than that of the defendant, the rule can have no application, and the

court should refuse to instruct upon the doctrine under consideration. In cases where the evidence is in conflict upon this point, or in cases where the undisputed evidence upon this question is of such a character that reasonable minds might draw opposite inferences, the question should be submitted to the jury under proper instructions from the court.

As we have heretofore said, the doctrine of last clear chance applies to cases only where the defendant's opportunity of preventing the injury by the exercise of due care was later in point of time than that of the plaintiff. This is a rule of universal application, and it affords the test of the applicability of the doctrine to a particular case.

As a sort of corollary to this rule, the courts have stated as a general proposition that, where the person injured has negligently exposed himself to the injury, he cannot recover on account of the negligence of the defendant by an application of the doctrine of last clear chance, unless it appears that the defendant's negligence intervened or continued after the negligence of the plaintiff ceased. Differently stated, the proposition is that, if the negligence of the injured party concurs with that of the defendant up to the very instant of the accident, or if it continues as long at least as the negligence of the defendant, the doctrine cannot be properly applied against the defendant. The proposition stated in the corollary will serve as a general rule for the application of the doctrine; but it is not a proposition of universal application. There is at least one class of cases in which it has been held that an injured person may recover by the application of the doctrine of last clear chance, notwithstanding his own negligence continues up to the very time of the injury. In this class of cases the courts recognize an exception to the corollary proposition above stated.

We shall first consider and apply the general rule hereinbefore stated, next the application of the proposition stated in the corollary, and lastly the class of cases in which the exception to the corollary proposition is recognized.

The general proposition is applicable to a class of cases in which it appears that the plaintiff by his own negligence has placed himself in a position of threatened danger from contact with some agency under the control of the defendant, and where his situation is such that he cannot by the exercise of due care extricate himself from the danger in time to avoid the injury, but that the defendant, by the exercise of due care, could prevent it and fails to do so. Under such circumstances, the negligence of the plaintiff is deemed to cease at and after the time he reaches a situation where due care on his part would be unavailing; and the special duty of the defendant to such person immediately arises, and if negligence on the part of the defendant then intervenes, or if, after that time, the defendant, by the exercise of due care, could prevent the injury and fails to do so, such subsequent negligence on the part of the defendant is treated as the sole proximate cause. The rule of law applicable to cases involving circum-

stances of this character is sometimes referred to as the rule of antecedent and subsequent negligence. The reason for the rule in such cases is that, after plaintiff's negligence has ceased, and after his opportunity to avoid the collision has passed, the defendant is guilty of negligence in failing to take advantage of the last clear chance to avoid the injury. In such a case, if the person in charge of the street car or other agency of the defendant sees the dangerous situation of the plaintiff before the collision, or if he might have discovered it by the use of due care, and if the collision occurs either by reason of his failure to use due care to discover the danger or to prevent the injury after such discovery, the plaintiff may recover even though negligent in the first instance. In such a case the defendant or his servants have the power to prevent the injury after the conditions arise which give rise to the duty to use special care toward the party injured and the plaintiff has not. *Cleveland, etc., R. Co. v. Klee*, 154 Ind. 430, 56 N. E. 234; *Metropolitan St. R. Co. v. Arnold*, 67 Kan. 260, 72 Pac. 857; *Pickett v. Wilmington R. Co.*, 117 N. C. 616, 23 S. E. 264, 30 L. R. A. 257, 53 Am. St. Rep. 611; *Houston R. Co. v. Sympkins*, 54 Tex. 615, 38 Am. Rep. 632.

If, in such case, the injury results from a negligent failure on the part of the person in charge of the car or other agency to see the dangerous situation of the plaintiff, and if such dangerous situation could have been discovered by the use of proper care in time to have avoided the injury, the plaintiff may recover by an application of the rule of last clear chance. Under such circumstances, the defendant or his servant by the use of due care could have discovered the danger, after the emergency giving rise to the special duty arose, and so likewise could the plaintiff; but the defendant, in case he had discovered the danger, possessed the ability to prevent the injury, while the plaintiff did not. The defendant, or his servants, therefore, had the last clear chance, for, by discovering the danger, they could have prevented the injury; but the plaintiff could not have prevented the injury, even though he had discovered the danger.

The weight of authority, as well as the better reason, supports the proposition that, in cases where the negligence of the plaintiff is antecedent to that of the defendant, and where such negligence of the plaintiff is deemed to have ceased prior to the injury, the plaintiff may recover by the application of the doctrine of last clear chance; and that it makes no difference, in such a case, whether the injury was caused by a negligent failure to discover plaintiff's danger, or by negligence in failing to use reasonable care to prevent the injury after discovering such danger.

We have been discussing cases, the circumstances of which show antecedent and subsequent negligence, and to which the general rule, just discussed, applies; but an effort is frequently made to invoke the doctrine of last clear chance in a class of cases in which there is nothing to show that the negligence of the defendant was subsequent to

that of the plaintiff, or that the plaintiff's negligence terminated prior to the injury or prior to that of the defendant. Such cases call for the application of the proposition heretofore stated as a corollary to the general rule.

The proposition stated in the corollary applies to a class of cases in which it appears that the plaintiff, without observing his surroundings, negligently goes upon the track of the defendant or in such close proximity to it as to expose himself to the danger of injury from a passing car, and where there is nothing to prevent him from observing his danger and avoiding the injury at any time before it occurs, and where it also appears that the motorman by reason of his negligence did not see the plaintiff or his danger in time to avoid the injury. In such a case the negligence of the plaintiff is concurrent and not antecedent, and the reason upon which the general rule is based cannot apply. If the want of care on the part of the plaintiff consists in a failure to discover his own danger, and if the want of care on the part of the defendant consists of a like failure to observe the dangerous situation of the plaintiff, and if such want of due care on the part of both continues until the injury occurs, or becomes so imminent that neither can prevent it, the plaintiff cannot recover. Under such circumstances, the opportunity of the plaintiff to observe the danger is equal to that of the defendant, and the duty to discover the danger and avoid the injury by the exercise of due care rests equally upon him and the defendant. If the opportunity of the plaintiff to avoid the injury was as late as that of the defendant, how can it be said that the defendant had the last clear chance of avoiding it? The test is: What wrongful conduct occasioning the injury was in operation at the very moment it occurred or became inevitable? If, just before the climax, one party only had the power to prevent the injury, and he neglected to make use of it, the responsibility is his alone; but if each had the power to avoid such injury, and each failed to use it, then their negligence is concurrent, and neither can recover.

In such a case, the negligence of the motorman in failing to keep a lookout in front of his car is the violation of the general duty which he owes to all persons making use of the street. He does not owe to the person negligently exposed to injury any special duty different from that owing to other travelers in the street, for the reason that he does not know prior to the injury that the situation of such person is such as to expose him to a particular danger. Such failure of the motorman to perform a general duty of this character is negligence, to which contributory negligence of the plaintiff is a defense. *Dyerson v. Union, etc., R. Co.*, 74 Kan. 528, 87 Pac. 680, 7 L. R. A. (N. S.) 132, 11 Ann. Cas. 207; *Green v. Los Angeles Terminal Co.*, 143 Cal. 31, 76 Pac. 719, 101 Am. St. Rep. 68; *Smith v. Norfolk, etc., R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287; *Butler v. Rockland, etc., R. Co.*, 99 Me. 149, 58 Atl. 775, 105 Am. St. Rep. 267; *French v.*

Grand Trunk, etc., R. Co., 76 Vt. 441, 58 Atl. 722; Robards v. Indianapolis St. R. Co., 32 Ind. App. 297, 66 N. E. 66, 67 N. E. 953.

In this case it appears from the uncontradicted evidence that the plaintiff walked across the street in plain view of an approaching street car which was moving at a rapid rate of speed, and stepped upon the track only three or four feet in front of such moving car. If she had used due care to observe the approach of the car a moment before she stepped upon the track, she could have avoided the injury. Her negligence was concurrent and not antecedent, and therefore the doctrine of last clear chance, as applied to antecedent and subsequent negligence, can have no application to this evidence, and this case is governed by the proposition stated in the corollary, unless the circumstances disclosed are such as to bring it within that class of cases to which the corollary proposition does not apply.

The proposition stated in the corollary has no application to that class of cases in which it appears that the motorman actually saw the person injured and realized, or should have realized, the peril to which he was exposed, or was about to expose himself, in time to have prevented the injury. In such a case the special duty toward the particular person arises as soon as the motorman sees him under such conditions as would indicate to a person of ordinary prudence that he was in danger of being injured by the car, or was about to expose himself to such injury. It then becomes the special duty of the motorman to use every reasonable means to avoid injuring him; and, if he does not do so, the injured person may recover notwithstanding his want of care in failing to discover the approach of the car continued up to the very instant of the injury, and notwithstanding, also, that the plaintiff possessed the physical ability to have avoided the injury in case he had discovered his peril at any time before the accident happened. Cases of this kind frequently arise out of an injury to a person working, walking, riding, or driving upon the tracks of a street railway company, or out of an injury to a person who by reason of the abstracted condition of his mind, or by reason of his attention being diverted, or for some other reason, enters upon the track of such company, without observing his danger from approaching cars, and remains oblivious to such danger until he is struck and injured. In such a case the company may be properly held liable by an application of the doctrine of last clear chance, if there is evidence from which the jury may properly find that the motorman actually knew of the perilous situation of the person subsequently injured in time to have avoided the injury by the exercise of proper care. Under such a state of facts, the motorman possessed the physical ability to avoid the injury before the accident, and so also has the injured party. In this respect their chances are equal; but the motorman actually possesses the knowledge of the danger and appreciates the necessity of taking steps to avoid the injury, while the person injured has no actual knowledge

of his danger, and does not appreciate the necessity of taking steps to avoid it.

The fact that the motorman sees, or otherwise has actual knowledge of, the dangerous situation in which the negligence of the plaintiff has placed him, and that he observes that the plaintiff is unconscious of his surroundings and oblivious of his danger, gives to such motorman the last clear chance of preventing the injury, and, in case he fails to take advantage of it, the plaintiff may recover. Some courts base the right of the plaintiff to recover in such a case upon a different ground, and assign as a reason that the conduct of the motorman, in failing to use proper means to stop the car after seeing the situation of the plaintiff and observing that he is not likely to escape injury, is of such a reckless, wanton, and willful character that it amounts to constructive willfulness, and that contributory negligence is not a defense to an action based on an injury so caused. *Krenzer v. Pittsburg, etc., R. Co.*, 151 Ind. 587, 43 N. E. 649, 52 N. E. 220, 68 Am. St. Rep. 252; *Smith v. Norfolk, etc., R. Co.*, 114 N. C. 728, 19 S. E. 863, 923, 25 L. R. A. 287. The rule is well stated in the case of *Harrington v. Los Angeles, etc., R. Co.*, 140 Cal. 514, 74 Pac. 15, 63 L. R. A. 238, 98 Am. St. Rep. 85. In speaking of the proposition here under consideration, the court says: "It is immaterial whether the liability of the defendant in such a case be based upon the theory that the negligence of the defendant, being the later negligence, is the sole proximate cause of the injury, or upon the theory that the defendant has been guilty of willful and wanton negligence. In either case, the liability would exist; for, where an act is done wantonly and willfully, contributory negligence on the part of the injured person is no bar to a recovery. *Esrey v. Southern Pac. R. Co.*, 103 Cal. 541, 37 Pac. 500. As said by Mr. Beach in his work on Contributory Negligence: 'When one, after discovering that I have carelessly exposed myself to an injury, neglects to use ordinary care to avoid hurting me, and inflicts the injury upon me as a result of his negligence, there is very little room for a claim that such conduct on his part is not willful negligence.' It is, of course, true, as urged by defendant, that it is essential to such liability that the defendant did actually know of the danger, and that there is no such liability where he does not know of the peril of the injured party, but would have discovered the same but for remissness on his part. *Herbert v. Southern P. Co.*, 121 Cal. 227, 53 Pac. 651. This, however, does not mean, as seems to be contended, that defendant must know that the injury is inevitable if he fails to exercise care, and the decisions indicate no such requirement. It is enough that the circumstances of which the defendant has knowledge are such as to convey to the mind of a reasonable man a question as to whether the other party will be able to escape the threatened injury. One in such a situation is in a dangerous position. It was said in the prevailing opinion in *Everett v. Los Angeles Consol. Electric R. Co.*, 115

Cal. 105, 106, 43 Pac. 207, 46 Pac. 889, 34 L. R. A. 350, distinguishing that case from those where the principle under discussion is applicable: "The case is not like one where the injured party is discovered in time lying or standing upon a railroad track under such circumstances as to make it doubtful whether he can or will get out of the way; or where one is attempting on foot, or otherwise, to make a crossing or passing along or on its track over a bridge or narrow causeway, or in a deep cut or tunnel, where to turn aside would be either dangerous or impossible. * * * Persons cannot be recklessly or wantonly run down on a railroad track, however negligent themselves, where the circumstances are such as to convey to the mind of a reasonable man a question as to whether they will be able to get out of the way.'" * * *

We can see no room for the application of the doctrine of last clear chance to a case where the failure on the part of the defendant to avoid the injury to plaintiff, after he had negligently exposed himself to danger, was due solely to the failure on the part of the motor-man to observe plaintiff's danger, and where it also appears that the plaintiff's failure to avoid the injury resulted solely from a like want of care on his part in failing to observe his own danger, and where his opportunity of avoiding the injury was as late or later than that of the defendant. To apply the doctrine of last clear chance to a case of this kind would be either to make it an exception to the rule that contributory negligence of the plaintiff bars a recovery in an action based on negligence, or to hold that the negligence of the defendant in such a case is more culpable than that of the plaintiff, and thus recognize the doctrine of comparative negligence.

It would be a fruitless task to attempt a review of the decisions upon this branch of the question. The cases cannot be reconciled for the reason that some of the cases seem to have been decided without making reference to any fixed rule or principle; the decision apparently resting upon the particular facts of the case. For a collection and classification of cases upon this subject, we refer to the notes upon the case of *Dyerson v. Union Pac. Ry. Co.*, 7 L. R. A. (N. S.) 132, and also the notes upon the case of *Bogan v. Carolina Central R. Co.*, 55 L. R. A. 418.

Under what circumstances plaintiff's negligence will be deemed to have terminated prior to the injury so as to bring the case within the class first named will often, no doubt, present a question of some difficulty. If the evidence upon the question is conflicting, or if opposite inferences may be reasonably drawn from the undisputed facts, it is of course a question for the jury.

In this case, the facts bearing upon this question are undisputed, and but one reasonable inference can be drawn, and that is that the plaintiff's want of care continued up to the time of her injury. Her

right to recover in this case, therefore, depended upon the question as to whether or not the motorman had actual knowledge of her danger in time to have avoided the injury.

The judgment is reversed, with directions to grant a new trial.

4. CHILDREN ²⁴

STONE v. DRY DOCK, E. B. & B. R. CO.

(Court of Appeals of New York, 1889. 115 N. Y. 104, 21 N. E. 712.)

This was an action to recover damages for alleged negligence in causing the death of plaintiff's intestate, a child of seven years and three or four months old.

ANDREWS, J. The nonsuit was placed on the ground that an infant seven years of age was *sui juris*, and that the act of the child in crossing the street in front of the approaching car was negligence on her part, which contributed to her death and barred recovery. We think the case should have been submitted to the jury.

The negligence of the driver of the car is conceded. His conduct in driving rapidly along Canal street at its intersection with Orchard street, without looking ahead, but with his eyes turned to the inside of the car, was grossly negligent. *Mangam v. Brooklyn R. R. Co.*, 38 N. Y. 455, 98 Am. Dec. 66; *Railroad Co. v. Gladmon*, 15 Wall. 401, 21 L. Ed. 114. It cannot be asserted as a proposition of law that a child just passed seven years of age is *sui juris*, so as to be chargeable with negligence. The law does not define when a child becomes *sui juris*. *Kunz v. City of Troy*, 104 N. Y. 344, 10 N. E. 442, 58 Am. Rep. 508. Infants under seven years of age are deemed incapable of committing crime, and by the common law such incapacity presumptively continues until the age of fourteen. An infant between those ages was regarded as within the age of possible discretion, but on a criminal charge against an infant between those years the burden was upon the prosecutor to show that the defendant had intelligence and maturity of judgment sufficient to render him capable of harboring a criminal intent. 1 Arch. 11. The Penal Code preserves the rule of the common law except that it fixes the age of twelve instead of fourteen as the time when the presumption of incapacity ceases. Penal Code, §§ 18, 19.

In administering civil remedies the law does not fix any arbitrary period when an infant is deemed capable of exercising judgment and discretion. It has been said in one case that an infant three or four

²⁴ For discussion of principles, see Chapin on Torts, § 113.

years of age could not be regarded as *sui juris*, and the same was said in another case of an infant five years of age. *Mangam v. Brooklyn R. R.*, *supra*; *Fallon v. Central Park, N. & E. R. R. Co.*, 64 N. Y. 13. On the other hand, it was said in *Cosgrove v. Ogden*, 49 N. Y. 255, 10 Am. Rep. 361, that a lad six years of age could not be assumed to be incapable of protecting himself from danger in streets or roads, and in another case that a boy of eleven years of age was competent to be trusted in the streets of a city. *McMahon v. Mayor*, etc., 33 N. Y. 642. From the nature of the case it is impossible to prescribe a fixed period when a child becomes *sui juris*. Some children reach the point earlier than others. It depends upon many things, such as natural capacity, physical conditions, training, habits of life, and surroundings. These and other circumstances may enter into the question. It becomes, therefore, a question of fact for the jury where the inquiry is material unless the child is of so very tender years that the court can safely decide the fact. The trial court misapprehended the case of *Wendell v. New York Central Railroad Company*, 91 N. Y. 420, in supposing that it decided, as a proposition of law, that a child of seven years was capable of exercising judgment so as to be chargeable with contributory negligence. It was assumed in that case, both on the trial and on appeal, that the child whose conduct was in question was capable of understanding, and did understand the peril of the situation, and the evidence placed it beyond doubt that he recklessly encountered the danger which resulted in his death. The boy was familiar with the crossing, and, eluding the flagman who tried to bar his way, attempted to run across the track in front of an approaching train in plain sight, and unfortunately slipped and fell, and was run over and killed. It appeared that he was a bright, active boy, accustomed to go to school and on errands alone, and sometimes was intrusted with the duty of driving a horse and wagon, and that on previous occasions he had been stopped by the flagman while attempting to cross the track in front of an approaching train, and had been warned of the danger. The court held, upon this state of facts, that the boy was guilty of culpable negligence. But the case does not decide, as matter of law, that all children of the age of seven years are *sui juris*.

We are inclined to the opinion that in an action for an injury to a child of tender years, based on negligence, who may or may not have been *sui juris* when the injury happened, and the fact is material as bearing upon the question of contributory negligence, the burden is upon the plaintiff to give some evidence that the party injured was not capable, as matter of fact, of exercising judgment and discretion. This rule would seem to be consistent with the principle now well settled in this state, that in an action for a personal injury, based on negligence, freedom from contributory negligence on the part of the party injured is an element of the cause of action. In the present

case the only fact before the jury bearing upon the capacity of the child whose death was in question was that she was a girl seven years and three months old. This, we think, did not alone justify an inference that the child was incapable of exercising any degree of care. But, assuming that the child was chargeable with the exercise of some degree of care, we think it should have been left to the jury to determine whether she acted with that degree of prudence which might reasonably be expected, under the circumstances, of a child of her years. This measure of care is all that the law exacts in such a case. *Thurber v. Harlem, B. M. & F. R. R. Co.*, 60 N. Y. 335. The child was lawfully in the street. In attempting to cross she was struck by the horse on the defendant's car and was run over and killed. The evidence would have justified the jury in finding that, when the child stepped down from the curbstone, the car was fifty or more feet away, and the distance from the curbstone to the track of defendant's road was less than twelve feet. The child, if she saw the car, might very well have supposed that she could get over the track before the car passed. There is evidence that the speed of the car was increased at about the time the child started to cross. It was, we think, for the jury to say whether the child's conduct was unusual or unnatural for a child of her years. She probably did not appreciate the rapidity of movement of the car, nor could it be expected that she would weigh the circumstances or fully understand the danger of attempting to cross in front of the car. The negligence of the defendant's driver is conceded, and it was for the jury to judge whether the conduct of the child in crossing the street to join another child engaged in roller skating on the opposite side was characterized by any want of that degree of care which children under similar circumstances would usually exercise. There is no question in the case of negligence on the part of the parent of the child. The point was not presented on the motion for nonsuit.

The judgment should be reversed and a new trial granted. All concur.

Judgment reversed.

5. IMPUTED NEGLIGENCE²⁵

WENTWORTH v. TOWN OF WATERBURY.

(Supreme Court of Vermont, 1916. 96 Atl. 334.)

HASELTON, J. On Sunday, October 11, 1915, in the early evening, the plaintiff, his wife, and a young woman, and one Gibson, were riding in an automobile. Gibson was the driver. At a culvert in the town of Waterbury the automobile went over and down an embankment, and the plaintiff was injured. Suit was brought against the town on the ground that the culvert was insufficient, and that the accident was due to such insufficiency. Trial by jury was had, with the result that verdict and judgment were for the plaintiff. The defendant excepted. The defendant at the close of the plaintiff's evidence, and of all the evidence, moved for the direction of a verdict in its favor on various grounds, among which was, in substance, this: That on all the evidence, viewed in the light most favorable to the plaintiff, the driver of the vehicle was guilty of negligence which contributed to the accident, and that, as matter of law, such negligence was attributable to the plaintiff.

As the automobile approached a culvert where there was some change in the course of the road, a horse and wagon were standing diagonally across the road between the rails on the embankment over the culvert. The testimony, viewed in the light most favorable to the plaintiff, tended to show that the rear wheels of the wagon were three or four feet from the railing on the easterly side; that the horse's head was nearer than that to the railing on the westerly side; that the driver of the automobile first saw the horse and wagon when he was about fifteen feet therefrom; that he then applied the brakes and turned to the left, where there was more, though insufficient, room, and brought the car practically to a standstill opposite the team, when the car slipped against the guard rail, which gave way in consequence of insufficiency, so that the car and its occupants, including the plaintiff, were precipitated down the embankment, and the plaintiff received the injuries complained of.

The driver was guilty of contributory negligence, as matter of law, for the physical facts shown by the exhibits, and the testimony most favorable to the plaintiff, make it entirely clear that, if he had used his senses to a reasonable degree, and driven with due care, he could and should and would have seen so far ahead that the accident would have been avoided. *Harrington v. Rutland R. Co.*, 89 Vt. 112, 119, 94 Atl. 431; *Labelle v. C. V. Ry. Co.*, 87 Vt. 87, 88 Atl. 517.

²⁵ For discussion of principles, see Chapin on Torts, § 113.

It was the statutory duty of the operator of the car, when approaching the curve in the road, to have the vehicle under perfect control. Acts 1912, No. 141. And here he had notice of the turn or curve before he reached it; for, as he testifies, he noticed that his headlights were shining, not onto the road, but into bushes beside the road, and this, by an invariable law of nature, was notice of a curve in the road. Automobile cases in point are *Knoxville & Co. v. Vangilder*, 132 Tenn. 487, 178 S. W. 1117, L. R. A. 1916A, 1111; *Tenor and Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924.

Was the negligence of the driver imputable to the plaintiff? Were we to follow what is said in *Carlisle v. Sheldon*, 38 Vt. 440, which adopts the reasoning of *Thorogood v. Bryan*, 8 C. B. 115, we should be obliged to hold that the passenger in a vehicle, whether public or private, is so identified with the driver, by virtue of that association merely, that the negligence of the driver is imputable to the passenger. But the unsoundness of the reasoning in those cases has been demonstrated over and over again. It is sufficient here to refer to *Little v. Hackett*, 116 U. S. 366, 6 Sup. Ct. 391, 29 L. Ed. 652.

We now consider the question of whether the plaintiff and the driver were so associated in the execution of a common purpose and undertaking as to make each the agent of the other and to make the negligence of one attributable to the other.

Mr. Gibson testified that an automobile party consisting of four, Mrs. Wentworth and a Miss Griffin, Mr. Wentworth, and himself, started from Fayston in the afternoon of Sunday, October 11, 1914, and went to Burlington for a ride, that they went for the purpose of showing Lake Champlain to Mrs. Wentworth and Miss Griffin; that they drove to the water front, drove around for a short time, and then started back over the road they had gone over; and that the accident in question took place about a mile northerly of Waterbury. According to his testimony the automobile was his father's, and not his; he was in Fayston temporarily on a lumber job. On the trip the plaintiff, Wentworth, sat with Gibson on the front seat, and Gibson's testimony that they took the trip for the purpose of showing Lake Champlain to the ladies, and his entire testimony as a whole indicates that he and Mr. Wentworth, the plaintiff, were engaged in the joint purpose of taking the two ladies for an afternoon's ride. The testimony of Mrs. Wentworth indicated the same thing, as did also that of Mr. Wentworth, the plaintiff. Miss Griffin did not testify, and there was no evidence as to the nature of the undertaking other than that of the three witnesses mentioned. Mr. Gibson testified in one place that the others of the party were his guests, but the word "guests" was put into his mouth by a question, and his testimony indicates that there was nothing more to that than that he drove. The testimony of all was to the effect that they went together for a ride.

In the view which we are inclined to think the case permits us to take, the plaintiff and Mr. Gibson were engaged in carrying out a common purpose, and the negligence of each was, on well-settled and rational principles, imputable to the other. *Boyden v. Fitchburg R. Co.*, 72 Vt. 89, 47 Atl. 409, and cases and notes herein elsewhere referred to. It may well be that *Carlisle v. Sheldon*, 38 Vt. 440, was rightly decided on the ground just referred to.

But, if this view of the transcript is not warranted, then the plaintiff is prevented from recovering because it is not possible to say that the case tends to show that the plaintiff was himself free from contributory negligence. His own testimony is that he saw the horse and wagon standing diagonally across the road when the automobile was from 8 to 12 rods away, and there is no suggestion in the case that he mentioned that fact to the driver or did anything but to sit supine and mute beside him on the front seat while the car went forward with unslackened speed. Even though we regard the two as not engaged in a common enterprise, the plaintiff was not excused from taking reasonable measures for his own protection. *Landrum v. St. Louis, etc., Ry. Co.* (Mo. App.) 178 S. W. 273, 276; *Clarke v. Connecticut Co.*, 83 Conn. 219, 76 Atl. 523; *Shultz v. Old Colony St. Ry.*, 193 Mass. 309, 323, 79 N. E. 873, 877, 878, 8 L. R. A. (N. S.) 597, 118 Am. St. Rep. 502, 9 Ann. Cas. 402; *Smith v. Maine Central R. Co.*, 87 Me. 339, 32 Atl. 967; *Whitman v. Fisher*, 98 Me. 575, 57 Atl. 895; *Brickell v. New York, etc., R. Co.*, 120 N. Y. 290, 24 N. E. 449, 17 Am. St. Rep. 648; *Brommer v. Pennsylvania R. Co.*, 179 Fed. 577, 103 C. C. A. 135, 29 L. R. A. (N. S.) 924, 19 Ann. Cas. 1225, note, subheading "Care Required of Occupant"; *Cotton v. Willmar*, 99 Minn. 366, 109 N. W. 835, 8 L. R. A. (N. S.) 643, 116 Am. St. Rep. 422, 9 Ann. Cas. 935, 938; *Colorado, etc., Co. v. Thomas*, 33 Colo. 517, 81 Pac. 801, 70 L. R. A. 681, 3 Ann. Cas. 700, and note 704.

If the burden of showing contributory negligence had been on the defendant, we might think that here the question of the plaintiff's contributory negligence was for the jury. But in this state such burden is on a plaintiff, and certainly the plaintiff wholly failed to sustain the burden of showing that he was personally free from contributory negligence, for in the state of the evidence it could not fairly and reasonably be inferred that he was so free.

This ground of the motion for a verdict, though argued by the defendant here, was not specifically pointed out in the motion, and, if available at all, is available under the ninth ground, namely, that "on all the evidence in the case the plaintiff is not entitled to recover." This might not be deemed sufficient if it did not appear that the court had in mind the necessity of the plaintiff's showing himself personally free from contributory negligence. But it appears that the court did have in mind such necessity, but took the course of submitting the

matter to the jury. In such circumstances we think that the general ground of the motion avails to raise the question.

Judgment reversed, and judgment for the defendant to recover its costs.

NEWMAN v. PHILLIPSBURGH HORSE CAR R. CO.

(Supreme Court of New Jersey, 1890. 52 N. J. Law, 446, 19 Atl. 1102, 8 L. R. A. 842.)

The plaintiff was a child 2 years of age. She was in the custody of her sister, who was 22. The former, being left by herself for a few minutes, got upon the railroad track of the defendant, and was hurt by the car. The occurrence took place in a public street of the village of Phillipsburgh. The carelessness of the defendant was manifest, as at the time of the accident there was no one in charge of the horse drawing the car; the driver being in the car, collecting fares. The circuit judge submitted the three following propositions to this court for its advisory opinion, viz.: "First, whether the negligence of the persons in charge of the plaintiff, an infant minor, should be imputed to the said plaintiff; second, whether the conduct of the persons in charge of the plaintiff at the time of the injury complained of was not so demonstrably negligent that the said circuit court should have nonsuited the plaintiff, or that the court should have directed the jury to find for the defendant."²⁶

BEASLEY, C. J. There is but a single question presented by this case, and that question plainly stands among the vexed questions of the law. The problem is whether an infant of tender years can be vicariously negligent, so as to deprive itself of a remedy that it would otherwise be entitled to. In some of the American states this question has been answered by the courts in the affirmative, and in others in the negative. To the former of these classes belongs the decision in *Hartfield v. Roper*, reported in 21 Wend. (N. Y.) 615, 34 Am. Dec. 273. This case appears to have been one of first impression on this subject; and it is to be regarded not only as the precursor, but as the parent, of all the cases of the same strain that have since appeared. The inquiry, with respects to the effect of the negligence of the custodian of the infant, too young to be intelligent of situations and circumstances, was directly presented for decision in the primary case thus referred to; for the facts were these, viz.: The plaintiff, a child of about two years of age, was standing or sitting in the snow in a public road, and in that situation was run over by a sleigh driven by the defendants. The opinion of the court was that, as the child was permitted by its custodian to wander into a position of such

²⁶ The statement of facts is abridged.

danger, it was without remedy for the hurts thus received unless they were voluntarily inflicted, or were the product of gross carelessness on the part of the defendants. It is obvious that the judicial theory was that the infant was, through the medium of its custodian, the door, in part, of its own misfortune, and that consequently, by force of the well-known rule under such conditions, he had no right to an action. This of course, was visiting the child for the neglect of the custodian; and such infliction is justified in the case cited in this wise: "An infant," says the court, "is not *sui juris*. He belongs to another, to whom discretion in the care of his person is exclusively confided. That person is keeper and agent for this purpose; and, in respect to third persons, his act must be deemed that of the infant; his neglect, the infant's neglect." It will be observed that the entire context of this quotation is the statement of a single fact, and a deduction from it; the premises being that the child must be in the care and charge of an adult, and the inference being that for that reason the neglects of the adult are the neglects of the infant. But surely this is conspicuously a non sequitur. How does the custody of the infant justify or lead to the imputation of another's fault to him? The law, natural and civil, puts the infant under the care of the adult; but how can this right to care for and protect be construed into a right to waive or forfeit any of the legal rights of the infant? The capacity to make such waiver or forfeiture is not a necessary or even convenient incident of this office of the adult, but, on the contrary, is quite inconsistent with it; for the power to protect is the opposite of the power to harm, either by act or omission. In this case, in 21 Wend. (N. Y.) 615, 34 Am. Dec. 273, it is evident that the rule of law enunciated by it is founded on the theory that the custodian of the infant is the agent of the infant, but this is a mere assumption without legal basis; for such custodian is the agent, not of the infant, but of the law. If such supposed agency existed, it would embrace many interests of the infant, and could not be confined to the single instance when an injury is inflicted by the co-operative tort of the guardian. And yet it seems certain that such custodian cannot surrender or impair a single right of any kind that is vested in the child, nor impose any legal burden upon it. If a mother, traveling with her child in her arms, should agree with a railway company that, in case of an accident to such infant by reason of the joint negligence of herself and the company, the latter should not be liable to a suit by the child, such an engagement would be plainly invalid on two grounds: First, the contract would be *contra bonos mores*; and, second, because the mother was not the agent of the child authorized to enter into the agreement. Nevertheless the position has been deemed defensible that the same evil consequences to the infant will follow from the negligence of the mother, in the absence of such supposed contract, as would have

resulted if such contract should have been made, and should have been held valid.

In fact, this doctrine of the imputability of the misfeasance of the keeper of a child to the child itself is deemed to be a pure interpolation into the law; for, until the case under criticism, it was absolutely unknown, nor is it sustained by legal analogies. Infants have always been the particular objects of the favor and protection of the law. In the language of an ancient authority, this doctrine is thus expressed: "The common principle is that an infant, in all things which sound in his benefit, shall have favor and preferment in law as well as another man, but shall not be prejudiced by anything to his disadvantage." 9 Vin. Abr. 374. And it would appear to be plain that nothing could be more to the prejudice of an infant than to convert, by construction of law, the connection between himself and his custodian into agency, to which the harsh rule of respondeat superior should be applicable. The answerableness of the principal for the authorized acts of his agent is not so much the dictate of natural justice as of public policy, and has arisen, with some propriety, from the circumstances that the creation of the agency is a voluntary act, and that it can be controlled and ended at the will of its creator. But in the relationship between the infant and its keeper all these decisive characteristics are wholly wanting. The law imposes the keeper upon the child, who of course can neither control nor remove him, and the injustice, therefore, of making the latter responsible in any measure whatever for the torts of the former would seem to be quite evident. Such subjectivity would be hostile in every respect to the natural rights of the infant, and consequently cannot with any show of reason be introduced into that provision which both necessity and law establish for his protection. Nor can it be said that its existence is necessary to give just enforcement to the rights of others. When it happens that both the infant and its custodian have been injured by the co-operative negligence of such custodian and a third party, it seems reasonable, at least in some degree, that the latter should be enabled to say to the custodian, You and I, by our common carelessness, have done this wrong, and, therefore, neither can look to the other for redress; but when such wrongdoer says to the infant, Your guardian and I, by our joint misconduct, have brought this loss upon you, consequently you have no right of action against me, but you must look for indemnification to your guardian alone, a proposition is stated that appears to be without any basis either in good sense or law. The conversion of the infant, who is entirely free from fault, into a wrongdoer, by imputation, is a logical contrivance uncongenial with the spirit of jurisprudence. The sensible and legal doctrine is this: An infant of tender years cannot be charged with negligence; nor can he be so charged with the commission of such fault by substitution, for he is incapable of appointing an agent, the consequence being that he can,

in no case, be considered to be the blamable cause, either in whole or in part, of his own injury. There is no injustice nor hardship in requiring all wrongdoers to be answerable to a person who is incapable either of self-protection or of being a participator in their misfeasance. Nor is it to be overlooked that the theory here repudiated, if it should be adopted, would go to the length of making an infant in its nurse's arms answerable for all the negligence of such nurse while thus employed in its service. Every person so damaged by the careless custodian would be entitled to his action against the infant. If the neglects of the guardian are to be regarded as the neglects of the infant, as was asserted in the New York decision, it would, from logical necessity, follow that the infant must indemnify those who should be harmed by such neglects. That such a doctrine has never prevailed is conclusively shown by the fact that in the reports there is no indication that such a suit has ever been brought.

It has already been observed that judicial opinion touching the subject just discussed is in a state of direct antagonism, and it would therefore serve no useful purpose to refer to any of them. It is sufficient to say that the leading text-writers have concluded that the weight of such authority is adverse to the doctrine that an infant can become, in any wise, a tort-feasor by imputation. 1 Shearm. & R. Neg. § 75; Whart. Neg. § 311; 2 Wood, Railw, L., p. 1284.

In our opinion, the weight of reason is in the same scale.

It remains to add that we do not think the damages so excessive as to place the verdict under judicial control.

Let the Circuit Court be advised to render judgment on the finding of the jury.

NUISANCE

I. Public and Private Nuisance¹

WESSON v. WASHBURN IRON CO.

(Supreme Judicial Court of Massachusetts, 1866. 13 Allen, 95,
90 Am. Dec. 181.)

Tort. The first count of the declaration alleged that the plaintiff was owner of a freehold estate in a messuage and dwelling house in Worcester, contiguous to the land and buildings of the defendants, and occupied as a dwelling house for the plaintiff's tenants; and the defendants wrongfully kept and continued certain buildings, called and used for a rolling mill and foundry, next easterly from the land of the plaintiff, and occupied by the defendants for the manufacture of railroad iron, and other articles made from iron and steel, and kept and used large stationary steam engines, trip hammers, rolling mills and other machinery and furnaces for the melting of iron, etc., by night as well as by day, and made large quantities of railroad iron, and other articles made from iron and steel, and thereby, and by the action and motion of the said engines, mills and machinery, the ground and dwelling house of the plaintiff were greatly shaken and jarred, so that the house was greatly shaken to pieces and rendered uncomfortable and unfit for habitation and of no value.

The second count contained similar allegations in regard to another messuage and dwelling house, known as the Wesson Tavern House, with additional averments that the defendants consumed large quantities of coal, by means of which large quantities of coal dust, smoke and ashes, noisome and offensive, rose and issued from the defendants' buildings and entered into and diffused themselves over and through the plaintiffs' premises, rendering the same uncomfortable and unfit for habitation, and depriving her of the gains which she otherwise would have made.

The answer denied all wrongful acts on the part of the defendants, and all injury to the plaintiff.

At the trial * * * the plaintiff requested the court to instruct the jury that if her dwelling house was injured by jarring and shaking, and rendered unfit for habitation by smoke, cinders, dust and gas from the defendants' works, it was no defence to the action that many other houses in the neighborhood were affected in a similar way. But the judge declined so to rule, and instructed the jury, in accordance with the request of the defendants, that the plaintiff could not

¹ For discussion of principles, see Chapin on Torts, §§ 114, 115.

maintain this action if it appeared that the damage which the plaintiff had sustained in her estate was common to all others in the vicinity; but it must appear that she had sustained some special damage, differing in kind and degree from that common to all others in the neighborhood.

The jury returned a verdict for the defendants, and the plaintiff alleged exceptions.

BIGELOW, C. J.² * * * There can be no doubt of the truth of the general principle stated by the court, that a nuisance may exist which occasions an injury to an individual, for which an action cannot be maintained in his favor, unless he can show some special damage in his person or property, differing in kind and degree from that which is sustained by other persons who are subjected to inconvenience and injury from the same cause. The difficulty lies in the application of this principle. The true limit, as we understand it, within which its operation is allowed, is to be found in the nature of the nuisance which is the subject of complaint. If the right invaded or impaired is a common and public one, which every subject of the state may exercise and enjoy, such as the use of a highway, or canal, or public landing place, or a common watering place on a stream or pond of water, in all such cases a mere deprivation or obstruction of the use which excludes or hinders all persons alike from the enjoyment of the common right, and which does not cause any special or peculiar damage to any one, furnishes no valid cause of action in favor of an individual, although he may suffer inconvenience or delay greater in degree than others from the alleged obstruction or hindrance. The private injury, in this class of cases, is said to be merged in the common nuisance and injury to all citizens, and the right is to be vindicated and the wrong punished by a public prosecution, and not by a multiplicity of separate actions in favor of private individuals. Several instances of the application of this rule are to be found in our own reports. *Stetson v. Faxon*, 19 Pick. 147, 31 Am. Dec. 123; *Thayer v. Boston*, 19 Pick. 511, 514, 31 Am. Dec. 157; *Quincy Canal v. Newcomb*, 7 Metc. 276, 283, 39 Am. Dec. 778; *Holman v. Townsend*, 13 Metc. 297, 299; *Smith v. Boston*, 7 Cush. 254; *Brainard v. Connecticut River Railroad*, 7 Cush. 506; *Blood v. Nashua & L. R. Corp.*, 2 Gray, 140, 61 Am. Dec. 444; *Brightman v. Fairhaven*, 7 Gray, 271; *Harvard College v. Stearns*, 15 Gray, 1; *Willard v. Cambridge*, 3 Allen, 574; *Hartshorn v. South Reading*, Id. 501; *Fall River Iron Works Co. v. Old Colony & Fall River Railroad*, 5 Allen, 224.

But it will be found that, in all these cases, and in others in which the same principle has been laid down, it has been applied to that class of nuisances which have caused a hindrance or obstruction in the exercise of a right which is common to every person in the community, and that it has never been extended to cases where the alleged wrong

² The statement of facts is abridged and a portion of the opinion omitted.

is done to private property, or the health of individuals is injured, or their peace and comfort in their dwellings is impaired by the carrying on of offensive trades and occupations which create noisome smells or distributing noises, or cause other annoyances and injuries to persons and property in the vicinity, however numerous or extensive may be the instances of discomfort, inconvenience, and injury to persons and property thereby occasioned. Where a public right or privilege common to every person in the community is interrupted or interfered with, a nuisance is created by the very act of interruption or interference, which subjects the party through whose agency it is done to a public prosecution, although no actual injury or damage may be thereby caused to any one. If, for example, a public way is obstructed, the existence of the obstruction is a nuisance, and punishable as such, even if no inconvenience or delay to public travel actually takes place. It would not be necessary, in a prosecution for such a nuisance, to show that any one had been delayed or turned aside. The offense would be complete, although during the continuance of the obstruction no one had had occasion to pass over the way. The wrong consists in doing an act inconsistent with and in derogation of the public or common right. It is in cases of this character that the law does not permit private actions to be maintained on proof merely of a disturbance in the enjoyment of the common right, unless special damage is also shown, distinct not only in degree but in kind from that which is done to the whole public by the nuisance.

But there is another class of cases in which the essence of the wrong consists in an invasion of private right, and in which the public offense is committed, not merely by doing an act which causes injury, annoyance and discomfort to one or several persons who may come within the sphere of its operation or influence, but by doing it in such place and in such manner that the aggregation of private injuries becomes so great and extensive as to constitute a public annoyance and inconvenience, and a wrong against the community, which may be properly the subject of a public prosecution. But it has never been held, so far as we know, that in cases of this character the injury to private property, or to the health and comfort of individuals, becomes merged in the public wrong, so as to take away from the persons injured the right which they would otherwise have to maintain actions to recover damages which each may have sustained in his person or estate from the wrongful act.

Nor would such a doctrine be consistent with sound principle. Carried out practically, it would deprive persons of all redress for injury to property or health, or for personal annoyance and discomfort, in all cases where the nuisance was so general and extensive as to be a legitimate subject of a public prosecution; so that in effect a wrongdoer would escape all liability to make indemnity for private injuries

by carrying on an offensive trade or occupation in such place and manner as to cause injury and annoyance to a sufficient number of persons to create a common nuisance.

The real distinction would seem to be this: That when the wrongful act is of itself a disturbance or obstruction only to the exercise of a common and public right, the sole remedy is by public prosecution, unless special damage is caused to individuals. In such case the act of itself does no wrong to individuals distinct from that done to the whole community. But when the alleged nuisance would constitute a private wrong by injuring property or health, or creating personal inconvenience and annoyance, for which an action might be maintained in favor of a person injured, it is none the less actionable because the wrong is committed in a manner and under circumstances which would render the guilty party liable to indictment for a common nuisance. This we think is substantially the conclusion to be derived from a careful examination of the adjudged cases. The apparent conflict between them can be reconciled on the ground that an injury to private property, or to the health and comfort of an individual, is in its nature special and peculiar, and does not cause a damage which can properly be said to be common or public, however numerous may be the cases of similar damage arising from the same cause. Certainly multiplicity of actions affords no good reason for denying a person all remedy for actual loss and injury which he may sustain in his person or property by the unlawful acts of another, although it may be a valid ground for refusing redress to individuals for a mere invasion of a common and public right.

The rule of law is well settled and familiar, that every man is bound to use his own property in such manner as not to injure the property of another, or the reasonable and proper enjoyment of it; and that the carrying on of an offensive trade or business, which creates noisome smells and noxious vapors, or causes great and disturbing noises, or which otherwise renders the occupation of property in the vicinity inconvenient and uncomfortable, is a nuisance for which any person whose property is damaged or whose health is injured or whose reasonable enjoyment of his estate as a place of residence is impaired or destroyed thereby may well maintain an action to recover compensation for the injury. The limitations proper to be made in the application of this rule are accurately stated in *Bamford v. Turnley*, 3 Best & Smith, 66, and in *Tipping v. St. Helen's Smelting Co.*, 6 Best & Smith, 608-616; s. c. 11 H. L. Cas. 642, and cases there cited. See, also, in addition to cases cited by the counsel for the plaintiff, *Spencer v. London & Birmingham Railway*, 8 Sim. 193; *Soltau v. De Held*, 9 Sim. (N. S.) 133.

The instructions given to the jury were stated in such form as to lead them to infer that this action could not be maintained, if it ap-

peared that other owners of property in that neighborhood suffered injury and damage similar to that which was sustained by the plaintiff in her estate by the acts of the defendants. This, as applied to the facts in proof, was an error, and renders it necessary that the case should be tried anew.

Exceptions sustained.

II. Nuisance per Accidents *

HEEG v. LICHT.

(Court of Appeals of New York, 1880. 80 N. Y. 579, 36 Am. Rep. 654.)

Appeal from judgment of the General Term of the Supreme Court in the second judicial department, affirming a judgment in favor of defendant, entered upon a verdict. (Reported below, 16 Hun, 257.)

This action was brought to recover damages for injuries to plaintiff's buildings, alleged to have been caused by the explosion of a powder magazine on the premises of defendant; also to restrain the defendant from manufacturing and storing upon his premises fireworks or other explosive substances.

MILLER, J. This action is sought to be maintained upon the ground that the manufacturing and storing of fireworks, and the use and keeping of materials of a dangerous and explosive character for that purpose, constituted a private nuisance, for which the defendant was liable to respond in damages, without regard to the question whether he was chargeable with carelessness or negligence. The defendant had constructed a powder magazine upon his premises, with the usual safeguards, in which he kept stored a quantity of powder, which, without any apparent cause, exploded and caused the injury complained of. The judge upon the trial charged the jury that they must find for the defendant, unless they found that the defendant carelessly and negligently kept the gunpowder upon his premises. The judge refused to charge that the powder magazine was dangerous in itself to plaintiff and his property, and was a private nuisance and the defendant was liable to the plaintiff whether it was carelessly kept or not; and the plaintiff duly excepted to the charge and the refusal to charge.

We think that the charge made was erroneous and not warranted by the facts presented upon the trial. The defendant had erected a building and stored materials therein, which from their character were liable to and actually did explode, causing injury to the plaintiff. The fact that the explosion took place tends to establish that the

* For discussion of principles, see Chapin on Torts, § 116.

magazine was dangerous and liable to cause damage to the property of persons residing in the vicinity. The locality⁴ of works of this description must depend upon the neighborhood in which they are situated. In a city, with buildings immediately contiguous and persons constantly passing, there could be no question that such an erection would be unlawful and unauthorized. An explosion under such circumstances, independent of any municipal regulations, would render the owner amenable for all damages arising therefrom. That the defendant's establishment was outside of the territorial limits of a city does not relieve the owner from responsibility or alter the case, if the dangerous erection was in close contiguity with dwelling houses or buildings, which might be injured or destroyed in case of an explosion. The fact that the magazine was liable to such a contingency, which could not be guarded against or averted by the greatest degree of care and vigilance, evinces its dangerous character, and might in some localities render it a private nuisance. In such a case the rule which exonerates a party engaged in a lawful business, when free from negligence, has no application. The keeping or manufacturing of gunpowder or of fireworks does not necessarily constitute a nuisance per se. That depends upon the locality, the quantity, and the surrounding circumstances, and not entirely upon the degree of care used. In the case at bar it should have been left for the jury to determine whether from the dangerous character of the defendant's business, the proximity to other buildings, and all the facts proved upon the trial, the defendant was chargeable with maintaining a private nuisance and answerable for the damages arising from the explosion.

A private nuisance is defined to be anything done to the hurt or annoyance of the lands, tenements or hereditaments of another. 3 Bl. Com. 216. Any unwarrantable, unreasonable or unlawful use by a person of his own property, real or personal, to the injury of another, comes within the definition stated, and renders the owner or possessor liable for all damages arising from such use. Wood's Law of Nuis. § 1, and authorities cited. The cases which are regarded as private nuisances are numerous, and the books are full of decisions holding the parties answerable for the injuries which result from their being maintained. The rule is of universal application that while a man may prosecute such business as he chooses on his own premises, he has no right to erect and maintain a nuisance to the injury of an adjoining proprietor or of his neighbors, even in the pursuit of a lawful trade. Alfred's Case, 9 Coke, 58; Brady v. Weeks, 3 Barb. 159; Dubois v. Budlong, 15 Abb. Prac. 445; Wier's Appeal, 74 Pa. 230.

While a class of the reported cases relate to the prosecution of a legitimate business, which of itself produces inconvenience and injury to others, another class refers to acts done on the premises of the owner, which are of themselves dangerous to the property and the

⁴ "Legality" (?) Evidently a misprint.

person of others who may reside in the vicinity or who may by chance be passing along or in the neighborhood of the same. Of the former class are cases of slaughterhouses, fat and offal boiling establishments, hog styes, or tallow manufactories, in or near a city, which are offensive to the senses and render the enjoyment of life and property uncomfortable. *Catlin v. Valentine*, 9 Paige, 575, 38 Am. Dec. 567; *Brady v. Weeks*, 3 Barb. 157; *Dubois v. Budlong*, 15 Abb. Prac. 445; *Rex v. White*, 1 Burr. 337; 2 Bl. Com. 215; *Farrand v. Marshall*, 21 Barb. 421. It is not necessary in these cases that the noxious trade or business should endanger the health of the neighborhood. So also the use of premises in a manner which causes a noise so continuous and excessive as to produce serious annoyance, or vapors or noxious smells (*Tipping v. St. Helen's Smelting Co.*, 4 B. & S. [Q. B.] 608; *Brill v. Flagler*, 23 Wend. 354; *Pickard v. Collins*, 23 Barb. 444; *Wood's Law of Nuis.* § 5); or the burning of a brick kiln, from which gases escape which injure the trees of persons in the neighborhood (*Campbell v. Seaman*, 63 N. Y. 568, 20 Am. Rep. 567). Of the latter class also are those where the owner blasts rocks with gunpowder, and the fragments are liable to be thrown on the premises and injure the adjoining dwelling houses, or the owner or persons there being, or where persons traveling may be injured by such use. *Hay v. Cohoes Co.*, 3 Barb. 42; S. C., 2 N. Y. 159, 51 Am. Dec. 279; *Tremain v. Cohoes Co.*, 2 N. Y. 163, 51 Am. Dec. 284; *Pixley v. Clark*, 35 N. Y. 523, 91 Am. Dec. 72.

Most of the cases cited rest upon the maxim "sic utere tuo," etc., and where the right to the undisturbed possession and enjoyment of property comes in conflict with the rights of others, that it is better, as a matter of public policy, that a single individual should surrender the use of his land for especial purposes injurious to his neighbor or to others than that the latter should be deprived of the use of their property altogether, or be subjected to great danger, loss and injury, which might result if the rights of the former were without any restriction or restraint.

The keeping of gunpowder or other materials in a place, or under circumstances, where it would be liable, in case of explosion, to injure the dwelling houses or the persons of those residing in close proximity, we think, rests upon the same principle, and is governed by the same general rules. An individual has no more right to keep a magazine of powder upon his premises, which is dangerous, to the detriment of his neighbor, than he is authorized to engage in any other business which may occasion serious consequences.

The counsel for the defendant relies upon the case of *People v. Sands*, 1 Johns. 78, 3 Am. Dec. 296, to sustain the position that the defendant's business was neither a public nor a private nuisance. That was an indictment for keeping a quantity of gunpowder near dwelling houses and near a public street; and it was held (*Spencer, J.*, dissent-

ing) that the fact as charged did not amount to a nuisance, and that it should have been alleged to have been negligently and improvidently kept. It will be seen that the case was disposed of upon the form of the indictment, and while it may well be that an allegation of negligence is necessary where an indictment is for a public nuisance, it by no means follows that negligence is essential in a private action to recover damages for an alleged nuisance. In *Myers v. Malcolm*, 6 Hill, 292, 41 Am. Dec. 744, it was held that the act of keeping a large quantity of gunpowder insufficiently secured near other buildings, thereby endangering the lives of persons residing in the vicinity, amounted to a public nuisance, and an action would lie for damages where an explosion occurred causing injury. Nelson, C. J., citing *People v. Sands*, supra, says, "Upon the principle that nothing will be intended or inferred to support an indictment, the court said, for aught they could see, the house may have been one built and secured for the purpose of keeping powder in such a way as not to expose the neighborhood;" and he cites several authorities which uphold the doctrine that where gunpowder is kept in such a place as is dangerous to the inhabitants or passengers it will be regarded as a nuisance. The case of *People v. Sands* is not therefore controlling upon the question of negligence.

Fillo v. Jones, 2 Abb. Dec. 121, is also relied upon, but does not sustain the doctrine contended for; and it is there held that an action for damages caused by the explosion of fireworks may be maintained upon the theory that the defendant was guilty of a wrongful and unlawful act, or of default, in keeping them at the place they were kept, because they were liable to spontaneous combustion and explosion, and thus endangered the lives of persons in their vicinity, and that the injury was occasioned by such spontaneous combustion and explosion.

It is apparent that negligence alone in the keeping of gunpowder is not controlling, and that the danger arising from the locality where the fireworks or gunpowder are kept is to be taken into consideration in maintaining an action of this character. We think that the request to charge was too broad and properly refused. The charge, however, should have been in conformity with the rule herein laid down, and for the error of the judge in the charge the judgment should be reversed and a new trial granted, with costs to abide the event.

All concur.

Judgment reversed.

III. Abatement *

JONES v. WILLIAMS.

(Court of Exchequer, 1843. 11 Mees. & W. 176.)

PARKE, B. A rule was obtained in this case, by Mr. Erle, for judgment non obstante veredicto on the fourth plea found for the defendant, and argued a few days ago. This plea, to an action of trespass quare clausum fregit, stated, that the defendant, before and at the said time when, etc., was possessed of a dwelling house, near the locus in quo, and dwelt therein; and that the plaintiff, before and at, etc., injuriously and wrongfully permitted and suffered large quantities of dirt, filth, manure, compost, and refuse, to be, remain, and accumulate on the locus in quo, by reason whereof divers noxious, offensive, and unwholesome smells, etc., came from the close into the defendant's dwelling-house; and then the defendant justifies the trespass, by entering in order to abate the nuisance, and in so doing damaging the wall, and digging up the soil.

The question for us to decide is whether this plea is bad after verdict; and we are of opinion that it is.

The plea does not state in what the wrongful permission of the plaintiff consisted; whether he was a wrongdoer himself, by originally placing the noxious matter on his close, and afterwards permitting it to continue; or whether it was placed by another, and he omitted to remove it; or whether he was under an obligation, by prescriptive usage or otherwise, to cleanse the place where the nuisance was, and he omitted to discharge that obligation, whereby the nuisance was created. The proof of any of these three circumstances would have supported the plea; and if in none of the three cases a notice to remove the nuisance was necessary before an entry could take place, the plea is good; but, if notice was necessary in any one, the plea is bad, by reason of its neither containing an averment that such a notice was given, or showing that the continuance was of such a description as not to require one.

It is clear, that if the plaintiff himself was the original wrongdoer, by placing the filth upon the locus in quo, it might be removed by the party injured, without any notice to the plaintiff; and so, possibly, if by his default in not performing some obligation incumbent on him, for that is his own wrong also; but if the nuisance was levied by another, and the defendant succeeded to the possession of the locus in quo afterwards, the authorities are in favor of the necessity of a no-

* For discussion of principles, see Chapin on Torts, § 117.

tice being given to him to remove, before the party aggrieved can take the law into his own hands.

We do not rely on the decision in *The Earl of Lonsdale v. Nelson*, 2 B. & C. 302, as establishing the necessity of notice in such a case, for there much more was claimed than a right to remove a nuisance, viz., a right to construct a work on the plaintiff's soil, which no authority warranted; but Lord Wynford's dictum is in favor of this objection, for he states that a notice is requisite in all cases of nuisance by omission, and the older authorities fully warrant that opinion, where the omission is the nonremoval of a nuisance erected by another. *Penruddock's Case*, 5 Rep. 101, shows that an assize of quod permittat prosternere would not lie against the alienee of the party who levied it without notice. The judgment in that case was affirmed on error; and in the King's Bench, on the argument, the judges of that court agreed that the nuisance might be abated, without suit, in the hands of the feoffee; that is, as it should seem, with notice; for in *Jenkins's Sixth Century*, case 57 (no doubt referring to *Penruddock's Case*), the law is thus stated: "A. builds a house, so that it hangs over the house of B., and is a nuisance to him. A. makes a feoffment of his house to C., and B. a feoffment of his house to D., and the nuisance continues. Now D. cannot abate the said nuisance, or have a quod permittat for it, before he makes a request to C. to abate it, for C. is a stranger to the wrong; it would be otherwise if A. continued his estate, for he did the wrong. If nuisances are increased after several feoffments, these increases are new nuisances, and may be abated without request."

We think that a notice or request is necessary, upon these authorities, in the case of a nuisance continued by an alienee; and therefore the plea is bad, as it does not state that such a notice was given or request made, nor that the plaintiff was himself the wrongdoer, by having levied the nuisance, or neglected to perform some obligation, by the breach of which it was created.

Lord ABINGER, C. B., observed that it might be necessary in some cases, where there was such immediate danger to life or health as to render it unsafe to wait, to remove without notice; but then it should be so pleaded; in which the rest of the court concurred.

Rule absolute.

CONSPIRACY¹

COLLINS v. CRONIN.

(Supreme Court of Pennsylvania, 1887. 117 Pa. 35, 11 Atl. 869.)

PAXSON, J. The plaintiff in error has misapprehended the vital point in his case. The learned judge below did not lay down the broad principle that "there can be no recovery against one only, in an action on the case in the nature of a conspiracy brought against two or more." What he did say was this: "That fraud is never to be presumed, but must always be proven by evidence that is clear and satisfactory to the jury. And this action is founded upon the alleged fraud of the defendant. In order that the plaintiff can recover in this action, they must find that the evidence established by satisfactory proof the fact that the defendants were guilty of fraud; and this must be true of both defendants, as both John H. and Cornelius Cronin must have intended a fraudulent act, in order to entitle the plaintiff to recover." The plaintiff has assigned this instruction for error, and has cited *Lavery v. Vanarsdale*, 65 Pa. 507, and some other cases, in support of his position. In our opinion, he is not sustained by any of them. *Lavery v. Vanarsdale* is perhaps the strongest, and that does not touch the case. That was an action on the case in the nature of a conspiracy, brought by Lavery against Vanarsdale and 10 others for injuring him in his business as a school-teacher. The allegation was that the defendants, for the purpose of preventing the plaintiff from being engaged as a school-teacher for another year, willfully and maliciously prepared, signed, and induced others to sign, a petition representing that he was unfit for a teacher; and it was held by this court, in reversing the court below, that "where the action is brought against two or more, as concerned in the wrong done, it is necessary, in order to recover against all of them, to prove a combination or joint act of all. For this purpose it may be important to establish the allegation of a conspiracy. But, if it turn out at the trial that only one was concerned, the plaintiff may still recover, the same as if such one had been sued alone. The conspiracy or combination is nothing so far as sustaining the action goes; the foundation of it being the actual damage done to the party." And *Hutchins v. Hutchins*, 7 Hill (N. Y.) 104; *Jones v. Baker*, 7 Cow. (N. Y.) 445; and *Parker v. Huntington*, 2 Gray (Mass.) 124,—were cited by Mr. Justice Read in support of his text. This is perfectly good law. Under the facts of that case, the combination or conspiracy was nothing. One of the defendants could have traduced

¹ For discussion of principles, see Chapin on Torts, § 118.

the character of the plaintiff as a teacher as well as a number of them; and, if he had done so, he was clearly liable in damages for his own act, even although the other defendants had no part in it. It was an act capable of being performed by one defendant alone. But in the case in hand the conspiracy was everything. Without it the plaintiff has no cause of action, for the plain reason that the acts charged in the declaration were of such a nature that they could not be committed by one defendant alone. It was alleged that Cornelius Cronin had confessed fraudulent judgments to his son John for the purpose of hindering, delaying, and cheating the creditors of the former; that execution had been issued upon these fraudulent judgments, and his property sold, and bought in by his son, at much less than its value. This, if true, would have been a fraud upon the plaintiff and other creditors. The jury found that it was not true, under proper instructions from the court; for how could fraudulent judgments spring into existence between a father and son without collusion, combination, and conspiracy? And, if the judgments were bona fide, then the son was merely using his legal remedies to collect an honest debt due from his father. He had as much right to do this as had any other creditor, and no action lies against him therefor. The case is too plain for argument. Judgment affirmed.²

² Compare *Macaulay Bros. v. Tierney*, supra, p. 239.

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